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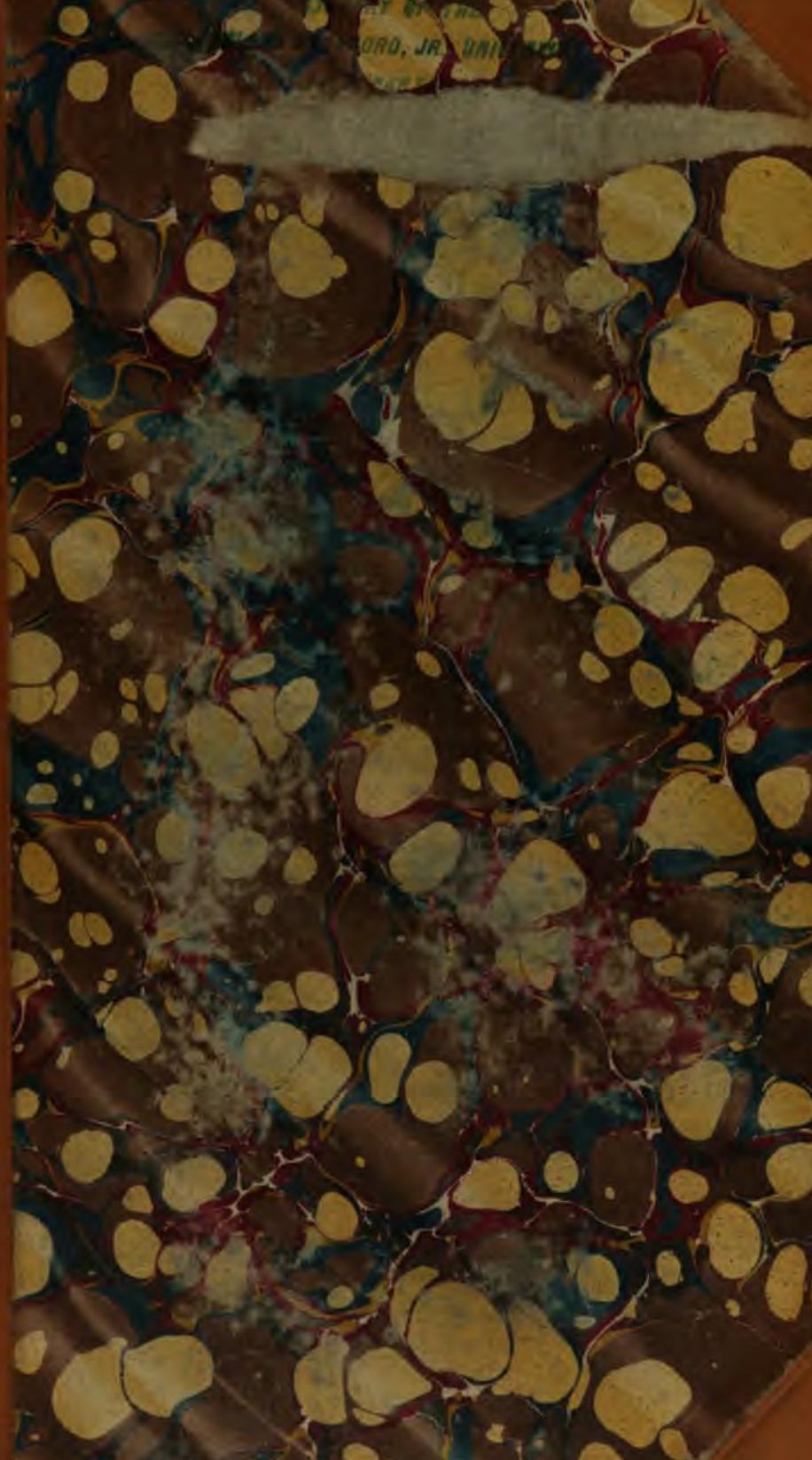
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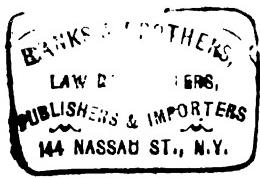
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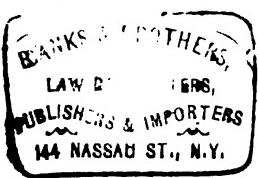
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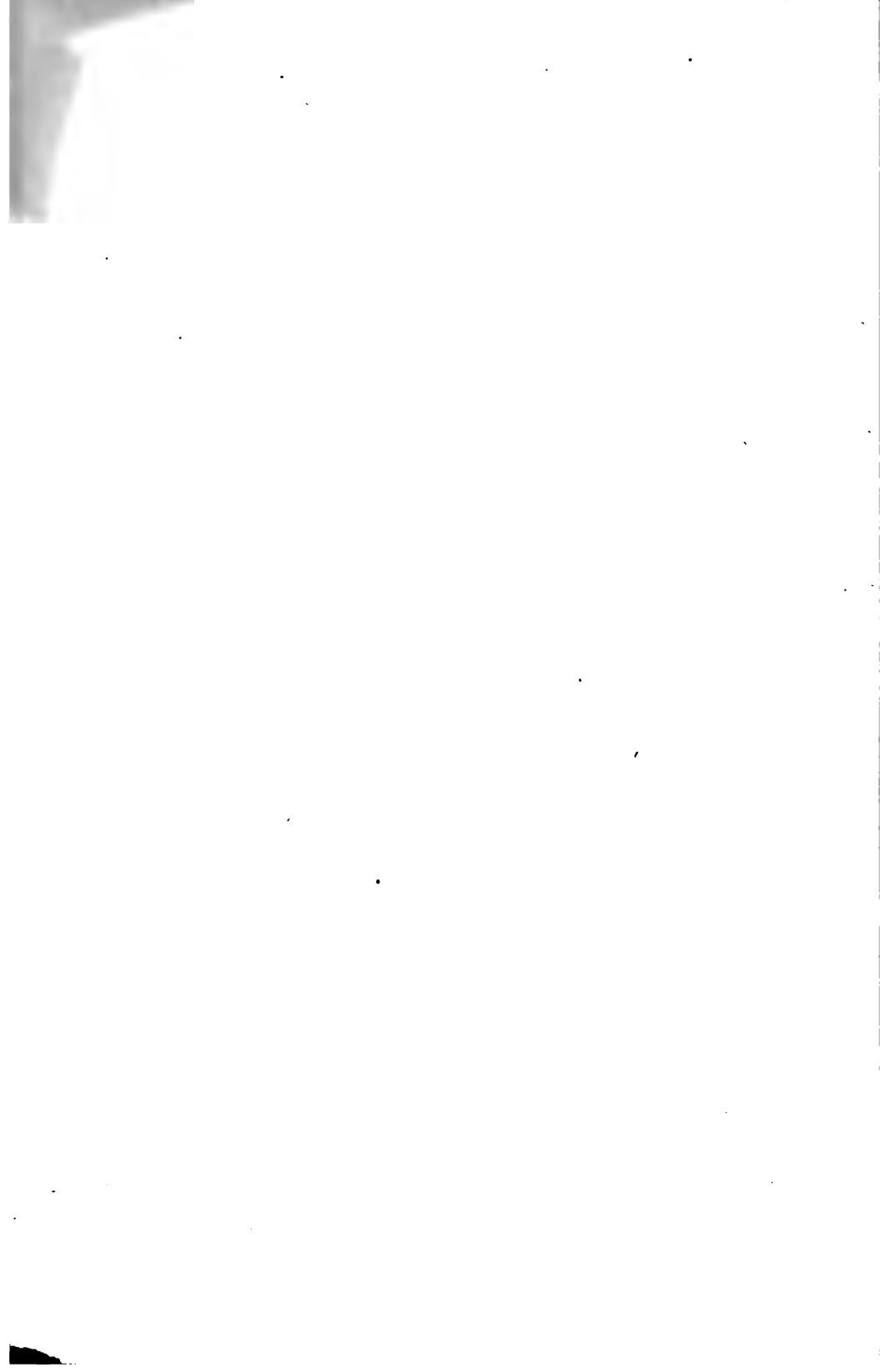
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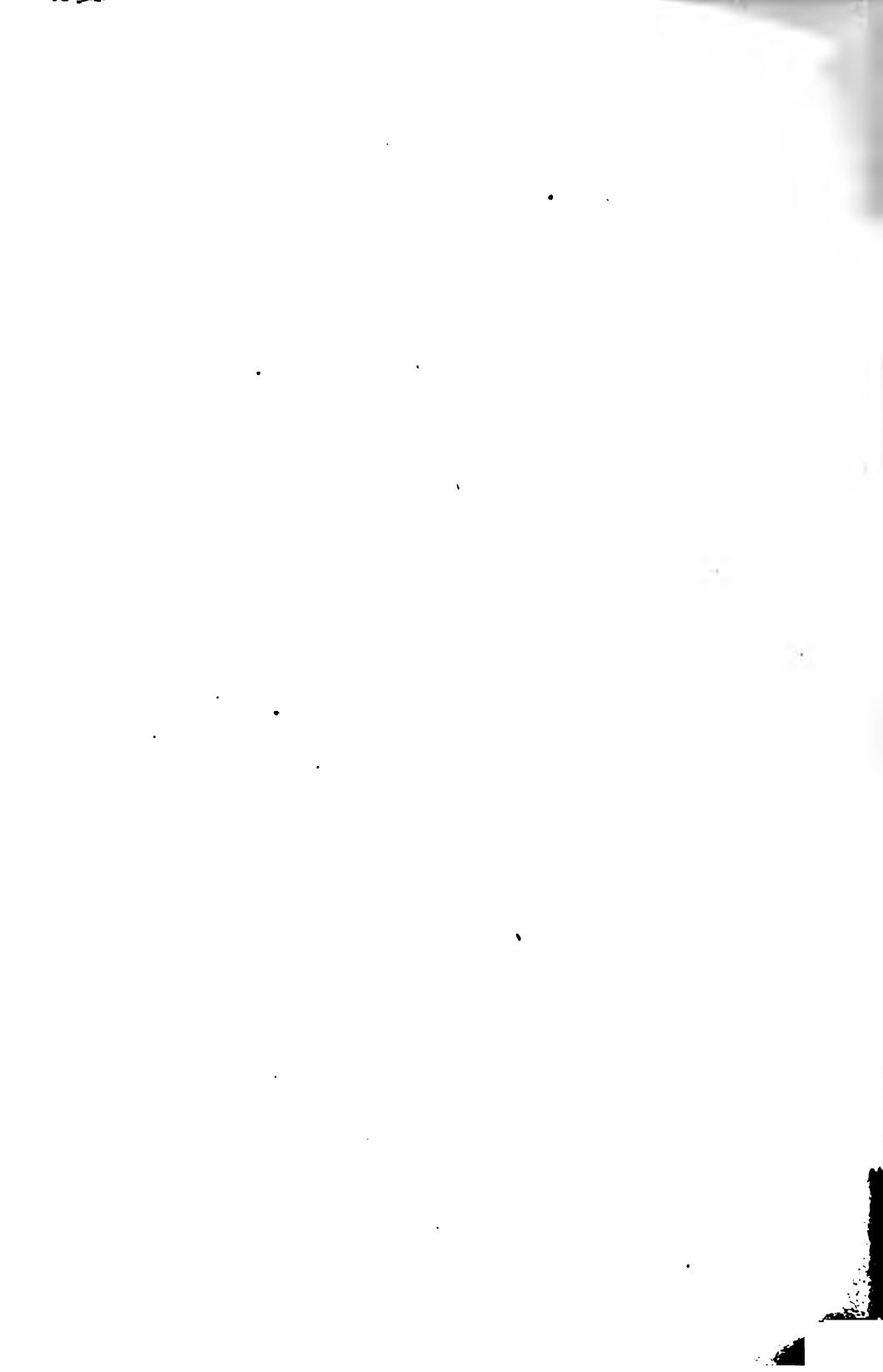
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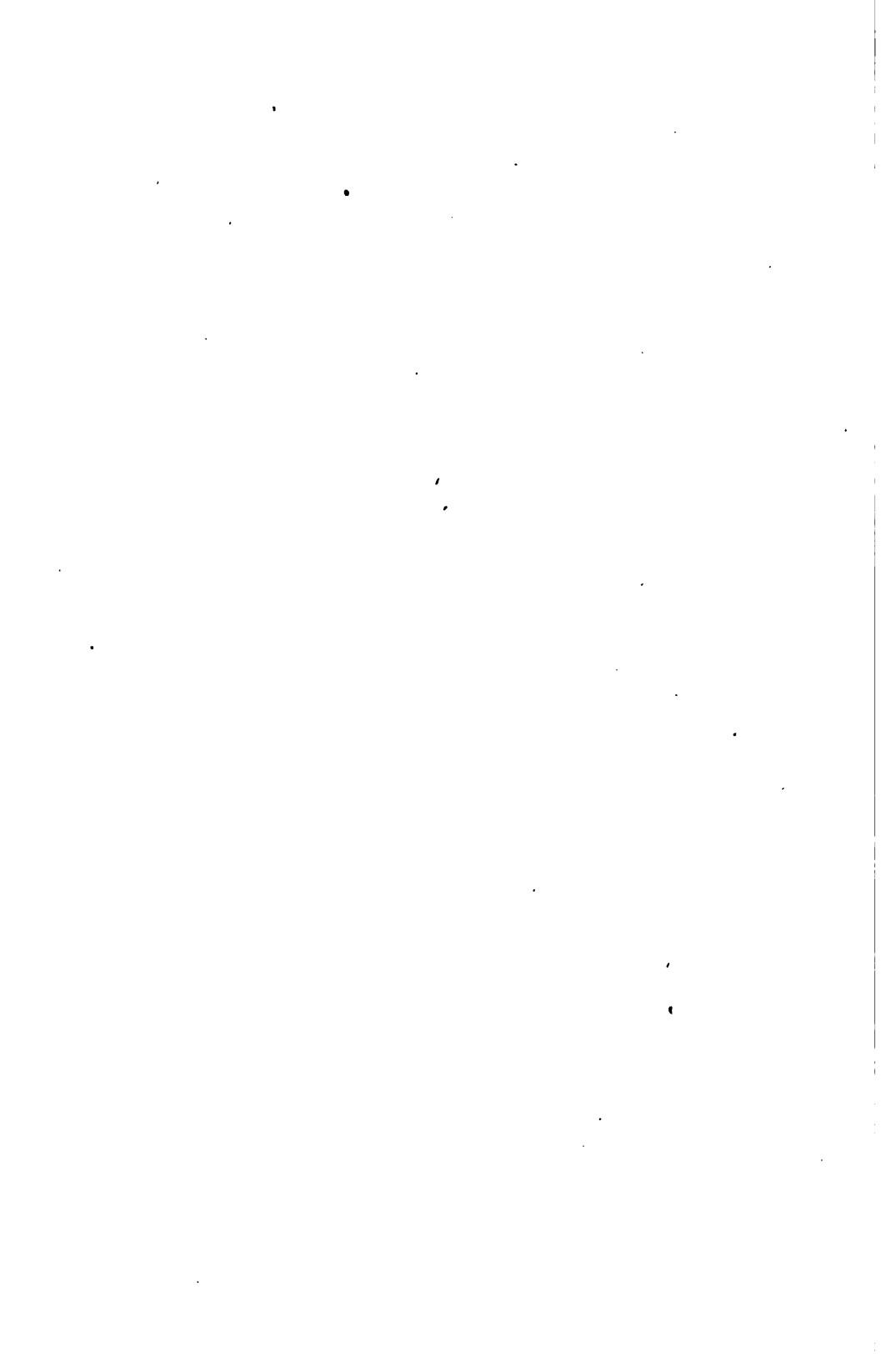


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# REPORTS OF CASES

ADJUDGED IN

# CHANCERY CHAMBERS,

BY

C. W. COOPER, BARRISTER,

REPORTER.

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VOLUME II.

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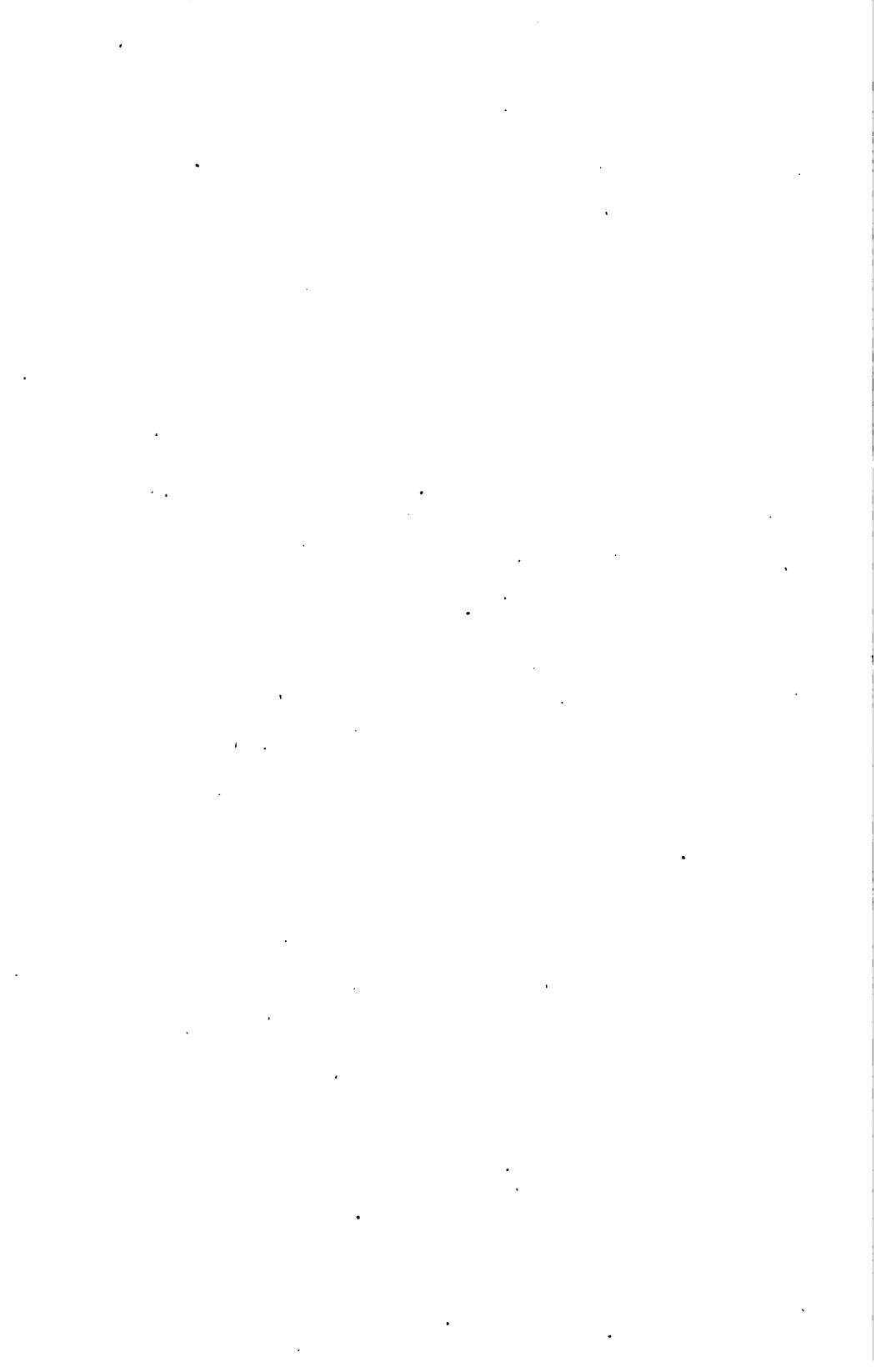
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**ORDERS**

**OF THE**

**COURT OF CHANCERY,**

**PROMULGATED APRIL 1, 1867.**

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## IN CHANCERY.

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# ORDERS OF COURT.

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1st APRIL, 1867.

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1. Every paper to be filed in the office of the Registrar at Toronto is to be distinctly marked at or near the top or upper part thereof on the outside, with the name of the city or town in which the bill is filed. And the Registrar is not to file any paper which is not so marked.
2. In ordinary suits for foreclosure or sale against infant heirs or devisees of the mortgagor, or of the assignee of the mortgagor, where no defence is set up in the infant's answer, the cause is not to be set down to be heard in Court by way of motion for decree; but after the infant's answer is filed, or after the time for filing the same has expired, the plaintiff is to file affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to a decree, and is to apply for the decree in Chambers, upon notice to the infant's solicitors.

3. A defendant may claim, by answer, any relief against the plaintiff which such defendant might claim by a cross bill.

4. All exhibits put in at the hearing of a cause are to be marked thus : "In Chancery, [short title]. This exhibit (the property of \_\_\_\_\_,) is produced by the plaintiff," (or defendant C,, as the case may be), this \_\_\_\_\_ day of 186 , A. B." (*the Registrar or Deputy-Registrar.*)

5. Every decree or order is to be bespoken, and the briefs and other documents required for preparing the same are to be left with the Judges' Secretary, within seven days after the decree or order is pronounced or finally disposed of by the Court.

6. In case any decree or order is not bespoken, and the briefs and other documents are not left, within the time prescribed by the next preceding rule, the decree or order is not to be drawn up without leave being obtained on an application in Chambers.

7. The plaintiff on applying for a decree on præcipe is to produce to the Registrar an office copy of the bill, in addition to the papers required by Order 4 of the General Orders of 10th January, 1863.

8. Decrees, Special Orders, and Reports are to be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively.

9. Upon every office copy of a decree served pursuant to section 2, of Order 6, of the General Orders of June, 1853, there is to be endorsed a memorandum in the form or to the effect following, that is to say, "Take notice, that from the time of the service hereof, you (*or, as the case may be, the infant or person of unsound mind*) will be bound by the proceedings in this cause in the same manner as if you (*or the said infant or person of unsound mind*) had been originally made a party to the suit: and that you (*or, the said infant, or person of unsound mind*) may, upon service of notice upon the plaintiff, attend the proceedings under the within decree; and that you (*or the said infant, or person of unsound mind*) may, within fourteen days after the service hereof, apply to the Court to vary or add to the said decree: A. B., of the City of Toronto, in the County of York, Plaintiff's Solicitor.

10. Where any person required to be served with an office copy of a Decree pursuant to sec. 2 of Order 6 of the General Orders of June, 1853, is an infant, or a person of unsound mind not found so by inquisition, the service is to be effected upon such person or persons, and in such manner as the Master before whom the reference under the decree is being prosecuted shall direct.

11. At any time during the proceedings before any Master under a Decree, the said Master may, if he thinks fit, require a Guardian *ad*

*item* to be appointed for any infant, or person of unsound mind not found so by inquisition, who has been served with an office copy of the Decree.

12. Guardians *ad litem* for infants or persons of unsound mind not so found by inquisition, who shall be served with an office copy of a Decree, are to be appointed in like manner as Guardians *ad litem* to answer and defend are appointed in suits on bill filed.

13. Trustees, Agents, and other persons in a fiduciary situation are not to bid under the General Order giving parties liberty to bid, but liberty in the case of such persons is only to be obtained on a special application.

14. Upon every order of revivor served in pursuance of the Order of 6th June, 1862, there is to be endorsed a memorandum in the form or to the effect following, that is to say : "Take notice that if you desire to discharge this order you must apply to the Court by motion or petition for that purpose within fourteen days after the service hereof upon you. The original bill in this cause is filed in the office of the Registrar (*or Deputy-Registrar*) at — ;" and if the service is after a decree directing a reference to a Master add, "and the reference under the decree in this cause is being prosecuted in the office of the Master at — ."

15. No certificate for an increased counsel fee, or for two counsel fees, is to be granted *ex parte*, unless the certificate is applied for within thirty days after judgment is given. Any application afterwards is to be on notice and at the expense of the party applying.

16. To secure uniformity of taxation, no Bill of Costs exceeding \$30 is hereafter to be taxed by the Accountant, Registrar, or Judges' Secretary, except in cases of decrees on *præcipe*, and under the second of these Orders, where there is no reference; and any costs heretofore directed to be taxed by the Accountant, Registrar, or Judges' Secretary, are to be taxed by the Taxing Officer, if the amount claimed exceeds that sum, notwithstanding anything to the contrary in the Order in that behalf contained.

17. Where two or more defendants defend by different Solicitors under circumstances that, by the law of the Court, entitle them to but one set of costs, the Taxing Officer, without any special order from the Court is to allow but one set of costs; and if two or more defendants defending by the same Solicitor separate unnecessarily in their answers, the taxing officer is, without any special order of the Court, to allow but one answer.

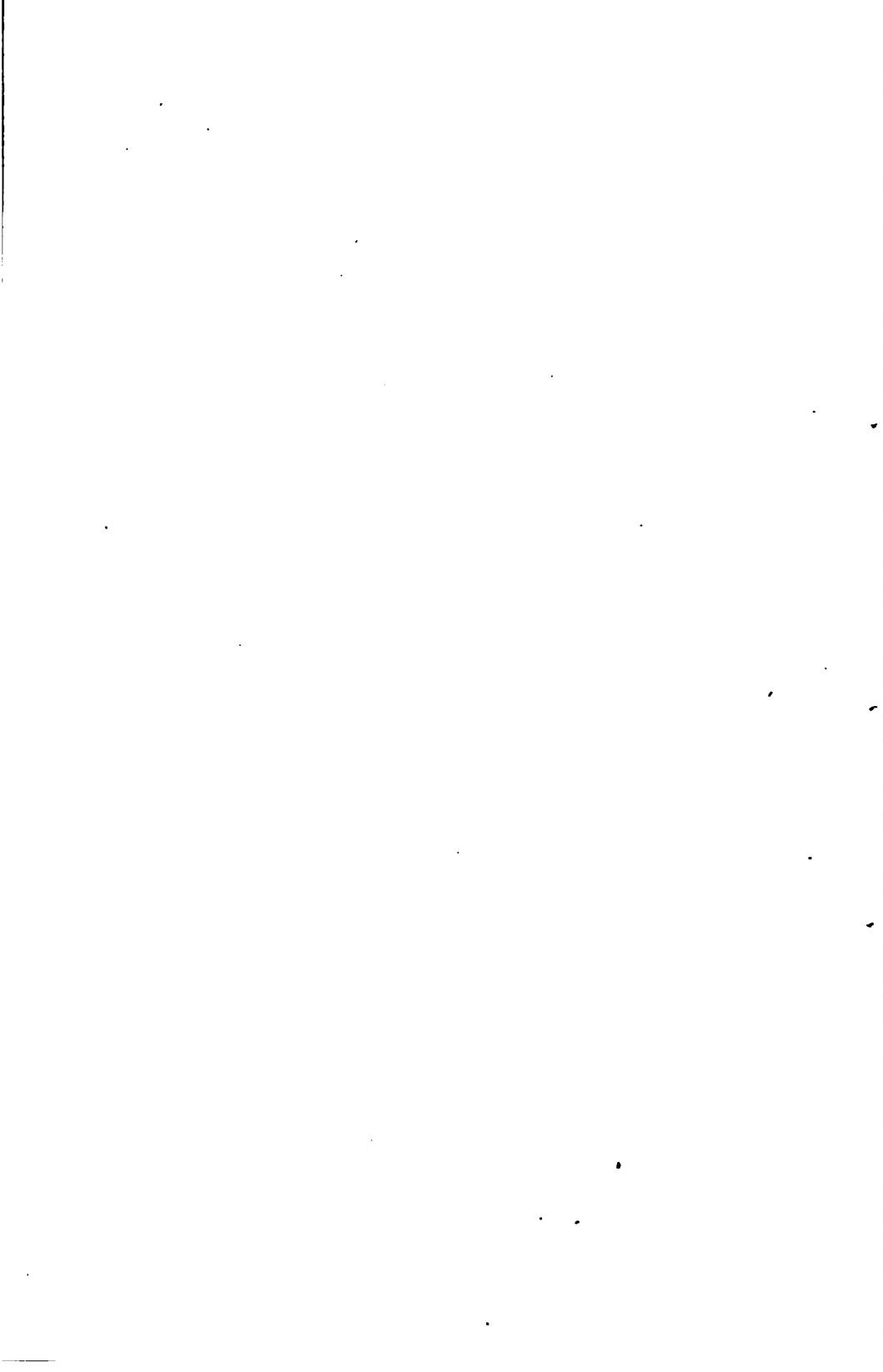
18. When after the date of this order a Guardian *ad litem* is appointed on the application

of the plaintiff to an infant, or to a person of unsound mind, not so found by inquisition, no costs are to be taxed to the Guardian ; but in lieu thereof, the plaintiff is to pay to the Guardian a fee of \$15, and his actual disbursements out of pocket ; and the plaintiff, in case he is allowed the costs of the suit, is to add to his own bill of costs the amount he so pays. But the Court may, in special cases, direct the allowance of taxed costs to a Guardian *ad litem*.

These Orders are to come in force on Monday,  
the 8th day of April, instant.

P. M. VANKOUGHNET, C.

O. MOWAT, V. C.



## REPORTS OF CASES

DECIDED IN

## CHANCERY CHAMBERS.

### BALDWIN v. CRAWFORD.

*Receiver—Principal and interest.*

Where a receiver had made an investment unauthorized by the Court, by which a profit had been made, the amount realized was directed to be added to the principal.

The funds in the hands of a Receiver in this cause had been invested, without reference to the Court, in stock in the Permanent Building Society. A motion was subsequently made that the investment so made be confirmed by the Court, when the Court refused the motion, and directed that the money and such "premiums" or "bonus" as had accrued, should be re-invested in real estate; the money arising from such stock having been paid into Court.

Mr. A. Hoskin, on part of defendant, Dr. Crawford, who was interested in the annual proceeds, moved that a portion of the premium for which such stock was sold should be paid out to him as an income, instead of being added to the principal.

Mr. G. Morphy and Mr. R. Sullivan, for certain other defendants, opposed the motion, on the ground that as the increase of capital had arisen out of an investment, which, however well intended by the Receiver, was still illegal, and as the interests of the infants had been jeopardized thereby,

they were entitled to the utmost extent to any advantage accruing from such illegal investment; and that further, as an application had been made for a loan of the entire moneys in Court, and their investment in certain farm property had, upon notice to the Solicitor of Dr. Crawford, been approved of by the Court, subject to the investigation of the title of the borrower by the referee of titles; and the borrower, in anticipation of such loan, had already executed the mortgage, and incurred a large amount of costs in obtaining evidence and otherwise perfecting his title, it was too late for Dr. Crawford to come in and ask for part of the moneys to be paid out to him as income, and that the interest of the borrower ought to be consulted; and further, that the question as to whether said premiums should be considered as income, or added to the principal, was discussed when the order was made for the sale of the stock, and it was then decided that it should be added to the principal.

MOWAT, V. C., on the following day, refused the motion with costs, on the grounds, that the investment was not one which strictly a receiver should have made, that the principal was risked, and any profit so made should be added to the principal, and treated as such.

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#### WEIR v. MATHESON.

*Motion to make decree in appeal order of Court.*

April 24, 1866.

*Semble*—A motion to make a decree of the Court of Appeal, an order of Court of Chancery may be made in Chambers if it is sought to make the order in the terms of the decree of Court above, but if further directions or new terms are necessary to carry out the decree in appeal, the motion should be to the Court.

In this cause a decree had been made by this Court, restraining the Trustees of Queen's College, Kingston, from, in any way, interfering with the plaintiff in the discharge

and performance of the duties of his office of Professor, and from withholding his salary.

The decree was appealed from and reversed, and it was referred back to this Court to carry out the order of the Court above. The Chancellor had directed that a certain sum of money be paid to the plaintiff, upon the application of the defendants to stay proceedings in this Court, pending the re-hearing of the cause—being six months' salary—with-out prejudice to either party.

A motion had been made in Court, to make the decree of the Court of Appeal an order of this Court, and for such further order as would carry out the decree in Appeal, and place the parties in the same position as before this Court erroneously assumed jurisdiction.

It was admitted by Counsel that all salary paid, or paid into Court, was to be refunded ; but as to the amount above mentioned, it was contended that it stood on a different foot-ing, and was the price of an indulgence, and should not be refunded.

The present judgment decided that, as the Court above had decreed that this Court had no jurisdiction to grant the major relief sought, it had no jurisdiction to grant the minor—that the money referred to should be repaid, and “the parties reinstated in the position they would have occupied if this Court had assumed no jurisdiction.”

A question arose on this motion as to whether it was properly a Chamber or a Court motion. The position taken by counsel being that if the motion had been merely to make the order of the Court of Appeal an order of this Court in its terms, that such a motion might be made in Chambers ; but inasmuch as in the present case something was yet to be done by this Court for which an order must provide, that it was properly made to the Court. As no allusion is made in the judgment to this question, it is assumed that the above rule is the correct one.—SPRAGGE, V. C.

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**PEARSON v. CAMPBELL.***Bill to redeem.*

On the question arising on demurrer as to whether a bill to redeem should contain an offer to redeem. Mowat, V. C., decided, without deeming it necessary to refer to authorities, that it need not, on the ground that the form given in the orders of bills to redeem contained no offer, but simply the prayer for leave to redeem.

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**SIMPSON v. OTTAWA.***Correcting clerical error.*

It was held that a motion to correct a clerical error in a report should be on notice, unless on consent of all parties.  
—MOWAT, V. C.

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**GRAY v. HATCH.***Notice of motion to commit.*

Four days' notice must be given of a motion to commit.

This was a motion to commit the defendant, Sally Hatch, for contempt, in not having produced books and papers in compliance with the terms of the usual order, under order 31 of 6th February, 1865, doing away with orders *nisi*. The defendant had been served with notice of motion, returnable two days after service.

*Barret* for the motion.

MOWAT, V. C., following a recent decision by the Chancellor on the same point, held that it was necessary that four days' notice should be given, and refused the application but without costs, as the former decision had not been reported and the practice not well established.

September 14, 1866.

JOHNSON V. COWAN.

*Amending Bill after replication.*

After replication had been filed, the plaintiff served a notice to amend his bill by adding parties, but raised no new issues. It was held that the plaintiff might amend his bill by adding a defendant, and making the amendment set out in his notice of motion. For this purpose it was considered not necessary to withdraw the replication. To do so is necessary only that the plaintiff may reply *de novo* to the answers of the new defendant, and in this case no new issue was raised. It has always been the practice to permit a plaintiff to amend for the limited purpose of adding parties without withdrawing his replication. (*Brattle v. Watterman*, 4 Sim. 125; *Brian v. Wastel*, 18 Jur. 446). The plaintiff must, however, pay the costs of the application.

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*In Re CRAWFORD AND CROMBIE.*

*Taxation—Adding an item.*

During taxation, of costs it was discovered by the Solicitor that an item, comprising a counsel fee paid, was omitted. An application for leave to add it was granted, on payment of costs, such costs being allowed to be set off against the taxed costs: but the adding of such item was not to effect the question of the costs of taxation. See *Re Whalley*, 20 Beav. 576.—THE SECRETARY.

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ROGERS V. WILLS.

*Parties—Pleading—Mortgagor and Mortgagee—Redeeming.*

MOWAT, V. C.—I think, on the allegations in the bill, there is sufficient ground shown for making Irwin a party.

There is no doubt that, as a general rule, a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage, (*Tasker v. Small*, 3 M. & C. 63). But that does not necessarily exclude the right of obtaining from other parties, under the same bill, relief consequent on such redemption. Thus, where one of two, or more persons, interested in the equity of redemption, files a bill to redeem, the decree after providing for the payment of the mortgage money, may proceed to carry out the equities arising therefrom as between the other parties. Of this several examples will be found in Seton on Decrees, p. 475 to 478, 3rd ed. So, if payment by the plaintiff to Irwin, the mortgagee, entitles the plaintiff to a release of other land from the mortgagor, I do not see why, on the same principle, the relief may not be decreed in the same suit. But the prayer of the bill is defective as regards this defendant. In *Dalton v. Hayter*, 7 Beav. 319, the Master of the Rolls held it to be a settled rule, "that the owner of the equity of redemption cannot make a mortgagee a party in respect of the mortgage estate without offering to redeem him." In *Inman v. Wearing*, 3 DeG. & Sm. 784, the Vice-Chancellor said, "The dismissal of a bill to redeem, otherwise than for want of prosecution, operates as a foreclosure. It may be questionable whether it would have this effect if it did not pray for redemption," and for want of such a prayer the demurrer was allowed, (see also *Knebill v. White*, 2 Y & C Ex. 15, *Attorney General v. Hardy*, 1 Sim N. S. 355, *Johnson v. Fesenmeyer*, 25 Beav. 96.) In the present case I do not say that the usual prayer for redemption was necessary, for the whole of the mortgage money is not due. But there is neither such a prayer, nor any equivalent prayer, adapted to the case; nor is there any offer to pay Irwin what is due him. There is indeed a statement that he is prepared to pay into Court \$360, but the sum appears, from the bill itself, to be less than is due him. I must therefore allow the demurrer without costs.

1 March, 1866.

**MASON v. JEFFREY.**

*Security for Costs.*

The plaintiff will be ordered to give security for costs where it is shown that he is insolvent and is carrying on the suit for the benefit of another party, who seeks to escape the risk of costs.

On a motion by Mr. *Smart* the following judgment of the Vice-Chancellor was delivered in this cause :—

**MOWAT, V. C.**—This is a motion by Jay Ketchum, one of the defendants, for security for costs ; the plaintiff is the assignee in insolvency of Sidney Smith. The defendant, John D. Armour, has filed a claim against the estate of the insolvent for a debt, against which the plaintiff alleges that the insolvent was entitled to indemnity out of the estate of Elijah Ketchum, deceased, and he insists that he, as assignee, has the same equity. The Bill accordingly prays that the debt may be paid, and for this purpose that the estate of Elijah Ketchum may be administered so far as may be necessary. The defendant supports his application for security by an affidavit alleging that the plaintiff is utterly insolvent ; that there are no assets whatever of Smith, and that his estate cannot, therefore, be prejudiced by the means suggested by the Bill ; that Armour is the beneficial plaintiff that he has instructed this suit to be brought, and that it is carried on at his expense, risk, and for his benefit. The plaintiff files no affidavit in answer to these statements. The cases at law cited in Lush's Practice, page 932, 3rd edition, are in favour of the application ; and Lord St. Leonards (then Sir Edward Sugden) held in *Burke v. Lidwell*, 1 Jones and Latourche, 703, that Courts of Equity had jurisdiction to give defendants the same remedy, and that is the only case in which the point seems to have been before an Equity Court. His Lordship observed :—" It has been stated that there is no precedent for this application. If there be not, I am prepared to make one. I should consider this Court nearly powerless if it could not stop such

a proceeding as that which is now brought under my consideration. \* \* The Court has jurisdiction over its suitors to compel them to do that which is just. It would be singular if it had not the same powers which in this respect is possessed by a Court of law. The cases at law are much stronger than the present. In them the plaintiff had a right to sue in his own individual character, but having that right, he was selected to try the question in dispute for the benefit of some rich man. The Court would not permit that, though the party had a right to sue ; they would not suffer the rich man to try the question except at the peril of costs. \* \* Then comes the question—Have I the power to act in accordance with my opinion ? This person has no property whatever ; he is not suing for anything belonging to himself, and, in fact, is a mere tool in the hands of Mr. Waters and his solicitors. It would be a reflection upon the administration of justice if I had not such a power. I am clearly of opinion that I have that power, and I am prepared to exercise it, and to make a precedent if none exists." I shall therefore, grant the order in the present case.

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May 26, 1866.

DONALDSON V. BERRY.

*Making a title where heirs are minors.*

MOWAT, V. C.—“ When the heirs are minors the Court has jurisdiction, on petition of the executor and executrix, to make an order vesting the estate in the purchaser, or as they may direct. This course will enable a title to be made free from any doubt. See Imp. Stat. : 11 Geo. 4, and 1 W. 4 ch. 60 § 6 & 11, 3 Daniel's practice, Perkins' edition 206, Consol. Stat. U. C. ch. 12 § 25, 26 and 63.”

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**BANK OF MONTREAL v. WALLACE.**

*To obtain an order to vacate an order pro con. and decree and get leave to answer, a very clear case must be made.*

**MOWAT, V. C.**—A Bill was filed on the 14th of May, 1864. On the 7th November, 1864, an order *pro confesso* was made against the petitioners. On the 10th January, 1865, a decree was pronounced, directing the usual enquiries as to incumbrances; appointing a day for payment of the plaintiff's debt, and on default ordering a sale. Default was made and the plaintiffs are in a position to proceed with the sale of the property. A petition was filed and notice of motion given for the 8th January last, but was not argued until the 1st of May. The application was to vacate the order *pro con* and decree, and for leave to answer. The petition was dismissed with costs; the V. C. observing that to succeed "would require a very clear case," and that he was "satisfied there was no bad faith on the part of those who represented the Bank, and no misunderstanding on the part of these petitioners."

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March 8, 1866.

***In Re WHITTEMORE—Ross v. MASON.***

A surety for an administrator, deceased, who was indebted to the estate, on judgment being recovered against him paid the amount, and took an assignment of the administration bond to a trustee for himself. Query—whether the debt to the surety was a specialty or a simple contract debt?

Upon an application for an order to distribute the fund, in Court, amongst the separate creditors of the late E. F. Whittemore, Messrs. Phipps and McPhail contended that the claim of John Helliwell (their trustee) was a specialty debt, and entitled to priority over simple contract creditors.

This claim arose under the following circumstances:—Whittemore, in his life time, on becoming administrator to the estate of one Edwards, then deceased, entered into the usual bond, with Messrs. Phipps and McPhail as his sureties, for the due administration of such estate.

Whittemore afterwards died in insolvent circumstances, and indebted, as such administrator, to Edwards' estate. Subsequently, judgment was recovered in the Court of Common Pleas upon the administration bond by Edwards' widow, (to whom it had been assigned by the Surrogate), against the sureties, for the sum of £169 10s., the amount due by Whittemore to Edwards' estate, which judgment the sureties afterwards paid. After the recovery, but before the payment, of the judgment, Mrs. Edwards also proved her claim upon the administration bond, in the Master's office, under the decree in this matter, against Whittemore's estate. Upon paying off the judgment, the sureties caused the bond to be assigned to Mr. Helliwell, in consideration, as therein expressed, of the sum of £169 10s., by him then paid to Mrs. Edwards, and the assignment is absolute in form, no trust for the sureties or otherwise being expressed therein.

In the Master's report, in this matter, the claim is allowed to "John Helliwell, as assignee of Catherine Edwards," and the above facts specially reported.

*Mr. Cattanach*, for the Commercial Bank, creditors of Whittemore, who have the conduct of the matter, contended that Helliwell, as trustee for the sureties, who had satisfied the bond, was merely a simple contract creditor of Whittemore, and not entitled to priority. He cited *Jones v. Davids*, 4 Russ. 277; *Warwick v. Richardson*, 14 Sim, 281; and *Copis v. Middleton*, T. & R. 224.

*Mr. Fenton* for the sureties, contended that Helliwell's claim is a specialty debt against Whittemore's estate, and entitled to priority over simple contract creditors. The bond was not extinguished on payment by the sureties, as it was not released but assigned absolutely to Helliwell; and, in any event, the sureties being, upon payment of the debt, entitled to the benefit of all collateral securities and advantages held and enjoyed by the creditor, had a right to avail themselves of the proof made upon the bond by Mrs. Edwards, in the Master's office, before it had been satisfied by the sureties, and to rank accordingly in her stead as a

specialty creditor on Whittemore's estate. See Lord Eldon's *dicta* in *Copis v. Middleton*, as to sureties' right to benefit of proof made by creditor against a bankrupt debtor before payment of debt by surety. Also, *ex parte* Atkinson 1, Cooke 282; *Ex parte* Matthews 6, Ves. 285; Burge on Suretyship (Ed. 1847) p. p. 350, 365.

MOWAT, V. C.—The Master reported John Helliwell as a creditor of the deceased for £184 10s. as assignee of the bond in question, and upon the facts as found, Mr. Helliwell is clearly a specialty creditor in respect of this debt. It was said in argument, however, that the money was paid by the sureties, and that the assignment made to Helliwell as a trustee for them; and the question discussed was whether, under such circumstances, the sureties are entitled to the benefit of the proof, and to priority over simple contract creditors. It was admitted, on behalf of the sureties, that but for the circumstance of the debt having been proved by Mrs. Edwards against the estate before it was paid by the sureties, they could not maintain this claim; but it was argued that the proof made all the difference. No case precisely in point was cited; cases in bankruptcy were referred to, but I do not see that they apply. Foreign laws were also referred to, but the law of England, until altered by the late statute, differed on this very subject from the laws of those countries in which the civil law has been adopted. See 1 St. Eq. Jur. ss. 499 c. note 4. The proof under the decree may be regarded as having the same force as a judgment at law against the principal separately; against his estate, would the sureties have been entitled to claim the benefit of such a judgment after paying the debt? This was not discussed before me.

In *Dowbigger v. Bourne*, 2, Y. & C. Ex., 462, Baron Alderson adjudged in such a case against the surety. Mr. Justice Story, in his Coms. § 499, states the law in the same way.

In C. P. Cooper's Chancery cases, App. 645, several Irish

cases are mentioned, in which the decision was, under like circumstances, in favour of the surety, and the learned editor, alluding to *Dowbigger v. Bourne*, says: "The decision of Mr. Baron Alderson is far from satisfactory."

In *Armitage v. Baldwin*, 5 Beav. 282, a similar question arose on demurrer, but the bill contained an express allegation, that the plaintiff, though surety, had "duly paid and satisfied the full amount of the judgment;" and the decision was in favour of the demurrer in consequence of this allegation. "How can I conclude," said His Lordship, the Master of the Rolls, "that, notwithstanding that the interest and costs incurred in relation thereto have been fully paid and satisfied, the judgment can now be made available at law?" But the learned Judge also remarked that he thought it not improbable that the sureties might, by a proper proceeding, ultimately succeed in establishing a right against the defendant.

Of the cases cited, the one which, in its circumstances, comes nearest to the present, seems to be that of *Warwick v. Richardson*, 14 Sim. 281, referred to on behalf of the plaintiffs. The payment there was after the debt had been proved, under an administration decree, against the estate of the principals, and the decision was against the surety; but the creditor had released him, and the decision proceeded not on the fact of payment, but on the technical ground that the release of one joint obligor was a release of both, and that the covenants relied upon as preventing that result were insufficient for the purpose. The course of the argument rather implies that the mere payment by the surety would not have put an end to the specialty debt.

Are the Irish cases, in connection with whatever arguments the sureties are entitled to found on the judgment in 5 Beav. and 14 Simons, sufficient to outweigh the direct authority of the case in Y. & C.?

I may observe, also, that in Mr. C. P. Cooper's volume, already referred to, several cases are mentioned in which a surety, after paying a debt due to the Crown, has been

allowed to use Crown process against his principal. See on the other hand, ex p. Usher, 1 B & B. 197.

The question as to the rights of the sureties here, should be raised on a written statement of the facts, and not on verbal admissions made in argument before the Judge, so that the unsuccessful party may be able to appeal, if not satisfied with the decision; and considering the state of the authorities, the Court should have the benefit of a thorough investigation and discussion of the cases by counsel, before being called upon to decide the question raised by the admissions.

I shall, therefore, treat the debt as a specialty debt due to Helliwell, as found by the Master, and shall leave any of the other parties, who may be advised that the other facts alluded to have put an end to the specialty debt, to adopt such a course as may be proper for raising the question in some formal manner for the decision of the Court. To afford time for this, the order for the distribution of the money will not be drawn up for—say a week, unless the other parties decide, meanwhile, on admitting Mr. Helliwell's claim as it stands.

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June 11, 1866.

EMES v. EMES.

*Decree.*

The fourteen days given to proceed on a decree, count from the pronouncing, not the entering.

On a motion to give the carriage of the decree to the defendant, on the ground that the plaintiff had not proceeded within fourteen days, a question arose as to whether the fourteen days counted from the "pronouncing" of the decree or the "entering," and Mr. Taylor's Book was referred to in support of the latter position, but V. C. Mowat held that the time should be reckoned from the *pronouncing* of the decree.

Tuesday, June 12, 1866.

REFEREE.

His jurisdiction—costs.

MOWAT, V.C.—*Re* Lot B. 8th concession, Enniskillen. The referee had made an order dismissing the petition of a petitioner for a certificate of title, with costs. A motion was made to set aside such order as irregular, and the powers and jurisdiction of the referee were discussed. The Court held that the referee had power over costs, and refused to set aside the order as irregular: but Mowat, V.C., expressed his intention to direct the referee in future to draw up orders in similar terms to reports of Masters: and that he "find and certify" instead of "adjudging and determining."

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YARRINGTON v. LYON.

*Demurrer—Qualified allegation.*

On demurrer *ore tenus* held that every material allegation in a bill must be positive.

A demurrer to an allegation qualified by the words "so far as the plaintiffs know," allowed, but without costs, as the objection was not taken on the record.

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ALLAN v. O'NEILL.

*Infant—Reference to arbitration.*

An application was made in this case by Strong, Q. C., on behalf of the plaintiff, for an order referring it to the Master of the Court to ascertain whether a submission to arbitration would be for the benefit of an infant defendant. This being the first application of the kind in our Courts, his Lordship V. C. Spragge, took time to consider the matter, and, after doing so, decided to grant the order applied for, on the ground that the established practice in England was in its favour. The effect of this order would be, of

course, to bind the infant by the award, and this is the only way in which an infant can be bound by a submission to arbitration without the aid of an Act of Parliament.

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**McKINNON v. MACDONALD.**

*Filing supplemental answer.*

A supplemental answer was allowed to be filed upon term, where new matter had been discovered since former answer filed and the delay in making the application was accounted for.

The defendant in this case applied to the Court, pursuant to leave given, to file a supplemental answer, or to have it referred to a jury, to ascertain whether the party through whom the defendant claimed title to the lands in question (situated in Glengarry), had not acquired, by possession, a title good against that set up by the plaintiff, in which case the plaintiff must fail.

*Mr. McGregor* supported the application, on the ground that there was newly discovered evidence, which had not been known at the time of the examination of witnesses and hearing; and he contended that the application was not too late, under the circumstances, and that it was a proper case for the Court to grant it.

*Mr. S. H. Blake*, for the plaintiff, contended that the application was too late, as the decree had been made in June last. He further contended that it would be a hardship to the plaintiff to have the matter opened anew.

*Mr. McGregor*, in reply, contended that the application could not have been made sooner, as judgment had not been given till just before the long vacation, and the absence of his Lordship V. C. Mowat, who had heard the cause, and before whom the present motion must be made, prevented an earlier application. He contended that the question of title by possession being purely one of common law cognizance, should be referred to a jury, and that the objection urged to this course, if it had any force (which he denied it had),

might be obviated by having the issue tried in another county.

MOWAT, V. C.—After considering the matter, decided that the defendant should have leave to file a supplemental answer, on paying the costs of the hearing, and of the present application ; the evidence already given to stand, and each party to be at liberty to give such additional evidence as they had, the plaintiff stipulating to give the defendant possession, in case the ultimate decision should be adverse to him, without an action of ejectment, and, in case of his refusal, the question to go to a jury.

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#### WOODSIDE v. THE TORONTO STREET RAILWAY COMPANY.

*Service out of jurisdiction.*

The plaintiff's solicitors had written to the defendant Hancock, (residing out of the jurisdiction), and had received letters in reply. They also mailed him an office copy of the bill properly endorsed, and had since received a letter showing that he had received the bill.

*Mr. A. C. Chadwick* moved an affidavit of these facts for an order allowing the service. He cited *Aldred v. Hicks*, 5 Taunt. 186. The Chancellor granted the order asked, but directed a copy of it to be mailed to the defendant.

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#### GRAHAM v. DAVIS.

*Infants—Enquiry whether sale beneficial.*

On motion for decree in this cause, his Hon. V. C. Spragge decided that infants, defendants, are not entitled, as a matter of course, to an enquiry as to whether a sale or foreclosure is most to their benefit, but that some grounds must be shown, and directed an affidavit to be filed. There appears to be some difference of opinion

upon this point, the general understanding among the profession being different from the view above expressed.

Mr. A. Cattenach, for plaintiff.

Mr. S. Vankoughnet for infant defendants.

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### SUTHERLAND v. DICKSON.

*Infants—Day to show cause.*

It was held by the Chancellor in this case that when a decree had been made against the ancestor of infant defendants in a suit revived against such infant defendants, that the decree having been made in the life-time of the ancestor, it was not necessary to insert in the final order a day to the infants to show cause. The decree being binding on the ancestor, must be so on the infants; and he observed that it was, he thought, "originally intended to give the infants a day to show cause, where a conveyance was required from him; and this seems to have been extended to foreclosures of his mere equity."

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### PEARSON v. CAMPBELL.

*Substitutional service.*

Substitutional service will not be allowed under the Act of 1865, unless it is shewn that it would be very expensive or very difficult to effect a service.

This was an application for substitutional service under the Chancery Amendment Act, 1865. The defendant, whom it was proposed to serve, resided in New York. It did not appear that there was any difficulty in serving him. Beyond the fact that he resided out of the jurisdiction, and that he had no agent in Canada West, nothing was urged as a reason why the motion should succeed. The words of the statute, it was contended, were wide enough to take in such a case.

SPRAGGE, V. C.—The motion cannot succeed. The statute is intended to apply to cases where the defendants

are very numerous, or where they reside out of the jurisdiction at a very great distance, or where the residence is not known at all, or where from any other cause it would be very difficult or very expensive to effect a service. The statute was not intended to apply to a case of this kind.

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DAVY V. DAVY.

*Dismissing bill—Delay.*

A motion to restore bill dismissed for want of prosecution was refused where great delay had taken place on the part of the plaintiff.

*Mr. Strong, Q. C., for plaintiff.*

*Mr. J. Hoskin, for defendant.*

MOWAT, V. C.—The bill, in this case was dismissed as against the defendant Cartwright, on the 23rd September, 1865, and as against the other defendants Aurelia Davy, Marshall C. Davy, Benjamin C. Davy, John Lasher and the Commercial Bank, on the 17th October following, for want of prosecution.

The plaintiff, on the 29th March, 1866, moved before me to restore this bill, in pursuance of a notice of motion served on the 5th of the same month. This motion I have now to dispose of.

The learned counsel for the plaintiff contended that these orders were irregular, but I am precluded from considering that question by the form of the notice. By the general order of 9th May, 1862, it is provided that “a notice of motion to set aside any proceeding for irregularity, must specify the irregularity complained of.” The notice of this motion does not comply with this rule.

I have only to consider, therefore, whether the circumstances of the case are such, that, in the exercise of the discretion which belongs to the Court in such matters, the application should be granted. The bill was filed on the 13th October, 1862. On the 12th February, 1863, the answers of five of the defendants against whom the bill has

been dismissed, appear to have been filed, upwards of three years ago. On the 12th January, 1864, the bill was amended by making Mr. Cartwright a defendant. On the 19th of the same month, the answer of some infant defendants was filed, and on the 21st March, 1864, or two years ago, Cartwright filed his answer. The plaintiff makes no attempt to justify the delay, as respects the five defendants, from February, 1863, to June, 1865, upwards of two years ; or as respects the other defendants, from March, 1864, to June, 1865, or for upwards of one year. The affidavits filed in support of the motion contain no explanation as to the absence of any proceedings against the other defendants. The learned counsel said he understood they were friendly defendants, and would answer forthwith. But this may be an error on his part ; for as to some of these defendants, the statements of the bill indicate the contrary. And in the absence of any affidavit, I cannot hold that the omission to compel answers from them has been accounted for.

If the defendants who have answered had moved to dismiss in June, 1865, on the materials now before me, the motion must have been successful. The Court would have held that there was no ground for indulgence. But, in June, 1865, the plaintiff swears that one of the defendants, Benjamin C. Davy, a solicitor of this Court, had a conversation with him, in which Davy made a verbal proposal to him for a settlement. The plaintiff did not at the time accept or decline this proposal ; nor does he state its nature or terms, nor say whether he ever contemplated acceding to the proposal. But he says he gave Davy "to understand that while such proposal was pending he (the plaintiff) would take no further proceedings. It was agreed as I supposed, at the time of such interview, that the defendant was to take no further proceedings while said proposal was pending. At the time of said interview I told the said Benjamin C. Davy "that I had some trouble at the time and could not attend to the settlement then, but that when my affairs became settled I would attend to the settlement." These statements are certainly most loose and unsatisfactory.

The plaintiff does not say he ever communicated this supposed agreement to his solicitor, and he made no communication respecting it to any of the defendants, or, so far as the affidavits show, to any one else up to the time of his hearing of the dismissal of his bill, which he says was in the February following, eight months after the conversation. In the fall of 1865, we find him boasting to one of the defendants that "his lawyer, Mr. Bell, told him he could keep the suit in Chancery, by paying \$50 a year, as long as he pleased." Meanwhile he held an injunction against the defendants' legal proceedings. Under all these circumstances I find it difficult to resist the conclusion that the reference to the alleged conversation in June is a mere pretence for delay. Mr. Benjamin C. Davy swears that the plaintiff's statements on the subject are wholly without foundation, and that he never spoke to the plaintiffs about the suit from the latter part of the year 1864 up to the dismissal of the bill. It is impossible for me, with safety to the general interests of suitors, to attach any weight as an excuse for delay, to the plaintiff's loose, unsatisfactory and suspicious statement, completely negatived as it is by the other party to the alleged conversation.

I may add that I do not think the delay from September or October last, in making the present application, is satisfactorily accounted for.

Under all the circumstances, I think it would not be proper or a sound exercise of discretion to grant this motion in the face of the great and unexplained delays which have occurred. If the plaintiff really has the equity he alleges, I think it far preferable to make him commence a new suit to enforce it. The costs hitherto incurred will be a reasonable penalty for him to pay for his more than neglect.

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**CAMERON v. MACDONALD—*In re MACDONALD.***

*Administration order—When refused.*

An administration order will not be granted where the grounds on which it is claimed are properly the subject for a bill.

*Mr. Blake*, Q. C., moved for administration order. Plaintiff claimed to be a creditor upon covenant of testator, for good title. Plaintiff had been ousted by title paramount. The application for administration order had been answered by the personal representatives, setting up the statute of limitations.

**SPRAGGE, V. C.**—The plaintiff now desires to take the case out of the statute by showing fraud in the testator. I think that for such a case a bill is proper, and that the questions which will necessarily be raised can not properly be discussed without pleadings and upon affidavit evidence. *Mr. Blake* concurs in this, as does *Mr. McLellan* for the personal representatives. The order will be that plaintiff files his bill within three months, in default of which this application is to be dismissed with costs. If bill filed, the costs of this application to be reserved.

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**CROOKS v. CROOKS.**

*Opening biddings.*

An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shewn on the part of the purchaser.

*Mr. English* for George Gordon Crooks and Allan A. Crooks, a proposed purchaser, moved to open biddings. The property is stated to have been insufficiently described; an advanced price is now offered.

*Mr. E. Henderson*, for the vendor, stated that the purchase had been completed.

**SPRAGGE, V. C.**—I do not call upon the vendor to show

cause ; the application is made after great delay and against an innocent purchaser. The practice is not to open bidding after the completion of the purchase ; at all events, unless for misconduct on the part of the purchaser ; none is charged here. It is true the property went to sale under the disadvantage of a very imperfect description by advertisement, and that the vendor had not sufficiently acquainted himself with the property to be able to answer questions put to him by certain of the audience at the auction, but these things ought not to affect the purchaser. I have always regarded the openings of bidding in this Court of doubtful policy. I think it to be of mischievous consequence to extend the practice.

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#### MASON v. SENNEY.

*Delivery up of possession—Mistake in decree—Costs.*

Where the decree by oversight contained no direction as to giving up possession, a supplemental order directing the delivery up of possession was made, but on payment of costs.

A motion for such an order was considered more properly a motion for Court than Chambers.

*Mr. H. Cameron*, for plaintiff.

*Mr Spencer*, for defendant, Porter.

**SPRAGGE, V. C.**—I think the proper course will be to make a supplemental order directing the delivery up of premises by Porter. It is part of the relief to which the plaintiff was entitled, and might with propriety have been mentioned in the décreté. The Court certainly will not compel the plaintiff to go to law in order to complete his relief. Porter does not show any cause why he cannot or ought not to deliver up possession. I make the order for delivery up of possession, but upon payment of costs of this application, as the direction should have been embraced in the decree, and the omission has made this application necessary, and Porter has been put to the expense of appearing upon it. I incline to think the application would have been more proper in Court than in Chambers.

## CUPPLES v. YORSTON.

*Substitutional service.*

On an application by Mr. Cooper for an order for substitutional service of bill of complaint on its being shewn that the defendant could not without delay and difficulty be served personally out of the jurisdiction, he not remaining long at one place, and that he had a branch business in Toronto in charge of an agent, and the subject matter of the suit having reference to such agency, service of bill on such agent was directed, and that a copy be mailed to the defendant at New York, nine weeks being given to answer.—MOWAT, V. C.

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## MULHOLLAND v. BRENT.

*Dismissing bill—Delay.*

This was an application on the part of all the defendants, except Neil McNeil, to dismiss the plaintiff's bill for want of prosecution. The bill was filed in November, 1864, some of the answers in April, 1865, and the last answer of the defendants on the 11th of September, 1865. There was a great deal of delay in serving the bill. No step was taken by the plaintiff, after the 11th September, until the 20th October last, when the defendant, Farncombe, was cross-examined on his answer. The plaintiff, after this examination, took no further step, although informed by the Solicitors for the defendants that they would move to dismiss the bill.

*Mr. S. H. Blake* submitted that the delay in the cause was very great; that the plaintiff, although informed several times that the defendants would move to dismiss his bill, had taken no step in the cause since the 26th of October last. Then the delay in serving the bill was inexcusable.

*Mr. R. Sullivan*, contra, contended that the plaintiff was only bound to account for the delay since the examination,

which delay, he said, was caused by the illness of counsel, to whom the case was submitted to advise upon as to amendment. Every effort had since been made to procure counsel's opinion, but without success, until after they had been served with the notice of motion to dismiss. They had now procured the opinion and were advised to amend, adding a party. Under such circumstances he submitted they should be allowed to amend. The delay in serving the bill was condoned by favour shown to the defendants in the suit.

*Mr. Blake*, in reply, cited authority, showing that a proposed amendment in such a case as Mr. Sullivan put was no answer to a motion to dismiss.

MOWAT, V. C.—I do not think the delay is accounted for satisfactorily. I do not think the plaintiff can go back to the 26th October, and commence from that period to reckon the delay in the suit. We must go back further. An examination of a defendant does not deprive him of his right under the General Orders to move to dismiss a plaintiff's bill for want of prosecution. It is not a regular step in the cause —of itself it is no answer to a motion to dismiss. The plaintiff might have examined the defendant, Farncombe, in this case in May last. In October he does so, and finds it necessary to submit his case to Counsel as to amendment. Counsel is of opinion that amendment is necessary. This is no answer to the motion. The delay is most flagrant, and is not accounted for. If this motion were not to succeed it is difficult to see in what case a plaintiff's bill should be dismissed for want of prosecution under the general order of this Court. The fact that the statute of limitations is pleaded makes no difference; it is rather an argument against the plaintiff than in his favour. The motion must succeed, and with costs.

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## WATT v. PARKER.

*Vendor and Purchaser—Who should prepare the conveyance?*

Where a purchaser, ruing his bargain, sued at law to recover back his purchase money, alleging but not showing, that the vendor could not make a title, and the question arose whether it was the duty of the vendor or purchaser to prepare the conveyance under a contract, which provided that the vendor should convey "at the expense, costs, and charges" of the purchaser, the Court of Law having held that the duty was that of the vendor. The learned Vice-Chancellor enjoined the proceedings at law, until the hearing on the authority of *Hawkins v. Kemp*, 3 East, 410; *Seward v. Wilcox*, 5 East, 198, and the practice in England, where the conveyance is prepared by the purchaser.—SPRAGGE, V.C.

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G., MORTGAGEE, v. V., MORTGAGOR.

*Mortgagor and Mortgagee—Extension of time for payment of mortgage money.*

A Judge in Chambers, though not as a matter of right, extended the time for the payment of mortgage money where the money was for purchase money and the Vendor had made a prior mortgage on the property which he had not paid off according to his covenant for title, and it appear'd that the existence of the first mortgage prevented the plaintiff from raising money to pay off the second.

*Mr. Strong, Q. C., and Mr. S. VanKoughnet* for petition.

*Mr. S. H. Blake and Mr. Barrett*, contra, moved for final foreclosure, and urged, amongst other arguments, that the defendant came too late to take advantage of the non-payment of the Dudley mortgage mentioned in the judgment, having before asked and obtained time for payment of his own mortgage money, and thereby admitted his liability to pay; they cited *Coombe v. Stuart*, 13 Beavan, 111, and other authorities.

The facts of the case fully appear in the following judgment, given by Mr. Vice-Chancellor Mowat:

This is a foreclosure suit, and two applications have been made to me therein—one a petition by the defendant, the mortgagor, for further time to pay his mortgage money, and the other a motion by the plaintiffs for foreclosure of the mortgage and subsequent encumbrances.

The mortgagee was the late Charles Berczy, and the plaintiffs are his representatives. Berczy was the owner of the property in question, and on the 21st January, 1853, mortgaged it with other property to one Mr. Dudley, who is no party to the present suit, for £5,000 sterling, payable on the 1st March, 1863. This mortgage was registered on the day after the execution. On the 1st August, 1855, Berczy sold and conveyed the property to the defendant, with absolute covenants for title, and on the same day the defendant executed a mortgage for the unpaid purchase money, payable 1st August, 1862. The defendant says he had no knowledge of Dudley's mortgage until after the deed and mortgage were completed, and this is not disputed. On the 12th January, 1863, the plaintiffs filed their bill against the defendant. The defendant filed no answer, and the bill was taken *pro confesso* against him, and it was referred to the Master to take accounts, &c. On the 2nd March, 1863, the plaintiff reduced the amount due on Dudley's mortgage to £2,877 sterling, and the time for paying the balance was extended by agreement between him and the plaintiffs for two years from that date. On the 7th September, 1863, the Master made his report finding the amounts due the plaintiffs, and subsequent incumbrances, who were made parties in his office. On the 6th October, 1863, the cause was heard on further directions, when the usual reference was made to the Master, and the property was ordered to be sold in case default should be made in paying what was due the plaintiffs. The Master made his report on the 7th December, 1863, and thereby found due to the plaintiffs £2,170 6s. 5d. which he ordered to be paid into the bank to the joint credit of the Registrar and the plaintiffs on the 7th June. The money not having been paid then, an order was obtained

on the 11th of the same month for the sale to be proceeded with. No sale could be effected, and on the 6th May, 1865, the Master so reported. On the 26th May, 1865, the plaintiffs took out an order that in case of the money not being paid in three months, the plaintiffs and all the incumbrancers made parties by the Master should stand foreclosed. On the 3rd November, 1865, an order was made giving the defendant three months' further time to pay. Before the time expired the defendant presented his petition, praying that the time should be further extended until the plaintiffs pay or discharge Dudley's mortgage, and for further relief.

The petition is supported by affidavits, showing, among other things, that the defendant has found it impossible to raise any loan on the property, in consequence of the prior mortgage to Dudley. The petition coming on to be heard before the day of payment had arrived, I ordered it to stand over until the plaintiffs should move for the final order, in order that the subsequent incumbrancers might be heard if they desired it. The petition and motion have now come on together, and all parties were represented on the argument of both applications.

The defendant's application seems very reasonable. It is admitted that the money, if paid, could not be obtained out of Court by the plaintiffs without their first procuring a release of Dudley's mortgage so far as relates to this property. On the other hand, a mortgagor is justified in looking to the mortgaged property as a means of raising the money, or part of the money, he has to pay; and where there is a temporary difficulty in raising the money to be paid, and there is a fair prospect of raising it within a reasonable time, the Court is liberal in granting further time to the mortgagor on terms just to the mortgagee. And, accordingly, where necessary, the time has in reported cases been repeatedly enlarged. Now, here there is more than difficulty in raising any money by way of loan on the mortgaged premises, there is an impossibility of doing so, and the impossibility arises from the mortgagee's own act

and default. He has not fulfilled his covenants with the defendant, and the property must have been unsaleable, in consequence, almost ever since the defendant purchased it. If, on an application like the present, the Court will grant further time where the mortgagee has nothing to do with the difficulty in raising the money, *a fortiori* must the further time be granted, where the difficulty arises from the act and default of the mortgagee and his representatives.

It is said, however, that the facts might have been used as a defence to the bill either by way of answer or by a cross bill, and that not having been so used, the defendant is deprived of all right to the aid of the Court on the ground of these facts now. It is certainly too late to set up the facts by answer or cross bill, (Story's Eq. Pl., 395 *et seq.*), though not, I apprehend, too late to file a bill for specific performance of the covenants in the deed to the defendant. The defendant's counsel claimed the time desired as a matter of strict right, and not merely as a matter for the discretion of the Court in view of all the circumstances. I think this argument placed the right too high, after all that has occurred, but I see nothing to justify my excluding from consideration the facts referred to with a view to the exercise of my best discretion, as in other applications of the same kind.

I think full justice will be done to the plaintiffs by giving, and that justice to the defendant can not be done without giving, a short reasonable time after the plaintiffs have fulfilled their obligation to the mortgagor by obtaining a release of the property from Dudley's mortgage, or by reducing the amount due upon it to the sum due to the plaintiffs by the mortgagor, in case the existence of the Dudley mortgage continues so long to create the same difficulty in raising money to pay off the mortgage held by the plaintiffs. I think it impossible to hold that the plaintiffs have any equity to foreclose their mortgages at an earlier period. I think the proper order to be made on the present applications will be to give the other encumbrances, say two months from the 3rd February instant

to redeem the plaintiff, and in case of their default and foreclosure, to give the mortgagor, say, one month more, for the same purpose. Should any of the defendants apply for further time, the application will be considered in reference to all the circumstances which may then be brought before the Court.

Nothing was said on the part of the plaintiffs as to the terms on which an order for enlargement, if made, should be granted. It was admitted that were the money paid, the plaintiffs could not claim the right of withdrawing it from the bank until they have procured a release of Mr. Dudley's mortgage, and there is therefore, no object that I can see in exacting immediate payment of part of the money as a condition of giving further time for paying the balance, unless the security is inadequate, if that would be a material consideration under the circumstances of the case. I think the affidavits do not warrant my regarding the security as inadequate, but the reverse, for, on the one side, the property has been positively sworn to be worth £5,000, or twice the amount due to the plaintiffs, to have been valued by the Trust and Loan Company, by their official valuator, at £4,000 to £5,000, and to have yielded an annual rental of £700 on an average of several years, while, the only material statement I find on the other side, is the belief of the plaintiffs, that the property would not sell for cash, discharged of incumbrances for more than the amount due to the plaintiffs. I think that the proper inference to be drawn from all the affidavits taken together, is, that even in the present depressed condition of real estate here, the property in question is a full security for the plaintiff's debt. On the whole, judging the case from the materials before me, and considering the long default of the plaintiffs in fulfilling the covenants of the mortgagee contained in his deed as vendor, and the serious consequences which result from such default to the vendee, the payment into Court of arrears ought not to be imposed on the latter, as a condition of obtaining further time to pay.

There has been an agreement between the parties that the

defendant's solicitor should receive the rents and pay them over to the plaintiffs, and this must still be done if the plaintiffs desire it. Otherwise, let the rents be paid into Court as soon as received.

Having reference to all that has occurred in this suit, I think the mortgagor should pay the plaintiffs' costs of the petition and motion. (I Seton on Decrees, 301, 392.)

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#### MACFARLANE V. DICKSON.

##### *Time for appealing.*

Where a cause had been reheard and the original decree affirmed, and an appeal was brought within a year of the decree on rehearing. Held, that the appeal should have been within a year from the original decree. And that in consequence of the delay a special application for leave to appeal was necessary.

Mr. Blain, for plaintiff.

Mr. Crickmore, contra.

MOWAT, V. C.—In this cause a decree for the plaintiff was pronounced on or about the 4th March, 1865; the decree bears date the 21st March, 1865. The cause was afterwards reheard and the decree affirmed. The judgment on the rehearing was pronounced on the 16th September, 1865. On the 26th March, 1866, the defendant served a petition of appeal from both decrees, and a notice that the hearing would be brought on upon the 28th June next. The defendants have filed a bond under the Act (Consolidated Statutes of Upper Canada, Cap. 13, sec. 15 and 16), to secure the plaintiff's costs of appeal, and the debt and interest and costs which the decree of March, 1865, ordered them to pay.

To this bond and the affidavits accompanying it, the plaintiffs take several objections, and they have gone into evidence as to the sufficiency of the securities.

The bond and affidavits are entitled with the names of both the original plaintiffs although one of them had died

and both are named in the bond as obligees. I think this is irregular.

I think also that the defendants are too late to appeal as of course. The Statute, sec. 55, requires an appeal to be brought to a hearing within one year from the pronouncing thereof. The learned counsel for the defendants admitted that it was too late to appeal from the original decree alone, but argued that the appeal as respects the order on rehearing was in time, and that this carried with it in effect the right to appeal from the original decree. No authority was cited in support of this view, and in the absence of such authority, I incline to think that as the Court, on rehearing, simply affirmed the original decree, the time for appealing *as of course* from that decree, must be reckoned as if there had been no rehearing, *vide Beaven v. Mornington*, 6 Jur., N. S., 1123.

Considerable expense appears to have been incurred in taking evidence as to the solvency or insolvency of the sureties, and as I do not decide on this evidence, and as the defendants will, I presume, move for leave to appeal, I shall not at present make any disposition of the application.

.**ORDER.**—Grant the motion. Reserve the costs, with liberty to either party to apply in respect thereof as he may be advised.

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#### BAXTER V. CAMPBELL.

##### *Changing venue.*

On the application to change the *venue*, it was objected that publication having passed, the motion should have been to open publication, and to amend bill by introducing words, changing the *venue*—a similar case having been mentioned as heard before V. C. Spragge, in which he gave effect to the objection, but allowed a new motion to be made at once without notice, his Honour followed the same course, and on a new motion being made, granted the application on terms.

—MOWAT, V. C.

**WHITE v. BASKERVILLE.**

*Demurrer filed pending motion to take pro con.—Held to be in time.*

In a case where a motion to take a bill *pro confesso* was pending, and a demurrer had been filed after notice of such motion was given, it was held, in the absence of authority to the contrary, that if a demurrer be filed before judgment is pronounced in such case on the *pro con* motion, it will be in time, and take precedence of an order to take bill *pro con*.—*Mowat, V. C.*

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**LONDON v. LONDON.**

*Swearing and identifying answer.*

In an alimony suit an arrangement for settlement was pending, and the defendant swore that he understood that pending such arrangement, until he could borrow a certain sum of money with a view of carrying out the proposed settlement, no further proceeding should be taken. A decree *pro con* had been taken, and an application was now made for leave to answer. A question arose on the argument as to whether the proposed answer should be sworn to before the application. His honour expressed an opinion that the answer was sufficiently identified by a copy attached to an affidavit of verification but said it was much better that in such cases the answer should be sworn to before the application. Verification by affidavit, however, was sufficient. *Merrill v. Ellis.* Chambers' Report was referred to. The application was granted on terms.—*SPRAGGE, V. C.*

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April 2nd, 1866.

**TRUST AND LOAN COMPANY v. REYNOLDS..**

*Mortgagee and Mortgagor—Sale.*

A sale will not be ordered until the mortgagor has had the usual time to redeem:

**MOWAT, V. C.**—In this case the plaintiffs are first mortgagees, the defendants are subsequent incumbrancers and the mortgagor. The decree is for foreclosure; the subsequent incumbrancers have made default, and desire that there should be a sale instead of a foreclosure. I think that the sale ought not to be ordered until after the mortgagor has the usual time to redeem, and that he should be served with the order directing the sale. The order will be accordingly.

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**BOULTBEE v. CAMERON.**

*Time for demurring—Effect of giving time to answer.*

Further time given to answer, will not carry with it a right to demur after the usual time.

Where a plaintiff's Solicitor had given further time to answer, and instead of answering the defendant's Solicitor filed a demurrer, it was ordered to be taken off the files.

**Mr. Alfred Hoskin** moved to take demurrer off the files under the following circumstances. The defendant's Solicitor had applied to the plaintiff's Solicitor, who had agreed to give him further time to answer, nothing was said at the time as to demurring—on the last day of the time given, a demurrer was filed. The plaintiff now contended that the extended time was given for answering only, and his consent did not extend to demurring; and that he would not have given time for that purpose, and he cited *Murray v. Cauty*, 5 Sim. 230; *Penn v. Lord Baltimore*, Dickens 237; *Lennick v. Clayton*, Dickens, 688; *Stephenson v. Gardner*, 2 P. W. 286; *Dyson v. Benson*, G. Cooper, 110; *Bruce v. Allen*, 1 Mad. 557; *Taylor v. Milner*, 10 Ves. 444; *Mann v. King*,

18 Ves. 297; *Taylor's Orders*, 67; *Morgan Ch. Acts and Orders*, *Daniel's Ch. Prac.* 542 and 543.

*Mr. George Holmested* shewed cause and contended that as nothing was said about demurring, he was entitled to the time given for any pleading he might find necessary. That the orders made in this Court on application for time, not expressing as they do in similar cases in England that the defendant have time to plead and demur "not demurring alone" the English cases did not apply, and that he might demur alone.

*SPRAGGE*, V. C., considered that the orders here ought to follow the language of the English orders; that their not doing so was not intended in any way to alter the practice, and he granted the motion with costs.

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March 23, 1866.

**KEACHIE v. BUCHANAN.**

*Admission of service.*

When a married woman, who had received an office copy bill and order to answer separately by mail accepted service in writing and returned the acceptance endorsed on the original order, it was held under the circumstances to be sufficient service.

This was an application for an order to take the Bill *pro confesso* against the defendant, Margaret Anne Fenn, a married woman, resident out of the jurisdiction at Sabrevois, in Canada East. The time for answering had expired, and no answer having been filed, the motion was made. The manner of effecting the service in this case was unusual and peculiar. The usual order for the defendant, above named Margaret Anne Fenn, to answer separate and apart from the husband, was taken out and sent by mail direct to her, together with an office copy of the bill of complaint, with a letter from the plaintiff's Solicitor, explaining the object of transmitting the papers. She received same and accepted service in writing, of a copy of the order to answer separately, and of the office copy of the bill, and returned the acceptance

endorsed on the original order. The signature to the acceptance was proved to be that of the defendant, Margaret Ann Fenn. She also wrote a letter acknowledging receipt of the order and office copy of the bill, and stated besides that she would offer no opposition to the suit. The letters were verified. No authority was cited to show that a defendant could accept service of a bill in person, or that such service was good service.

MOWAT, V. C., thought the service good, and granted the order.

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May 10, 1866.

BURGESS v. MUMA.

*Solicitor.*

A party alleged that he was induced by the plaintiff's solicitor to allow his name to be used as "next friend" on the assurance that he would not be rendered liable to costs,—the solicitor denied that It was considered such a fact could not be established by *ex parte* affidavits.

MOWAT, V. C.—This was an application by Charles Stobridge, the next friend of the infant plaintiff, alleging that he was induced by the plaintiff's Solicitor to consent to his name being used as "next friend," on the assurance that his doing so would not in any event render him liable for costs. Stobridge and the mother of the infant plaintiff swear distinctly to this assurance having been given, and the Solicitor and one of his clerks swear as distinctly to the reverse. A number of affidavits are filed as to a conversation between Stobridge and the clerk, subsequently, in which the latter is said to have admitted and reiterated the assurance Stobridge had received as to the effect of the proceedings. These affidavits may be treated as neutralizing the affidavit of the clerk, but cannot on an application like this be pressed further against the Solicitor. Two affidavits will, however, still remain against the affidavit of the Solicitor. Would it be safe or just to pronounce a Solicitor guilty of the grave

offence here charged, and to visit him with the consequences of it on such evidence ? The affidavits are prepared *ex parte*. I have not seen the deponents. Is a Solicitor at the mercy of any two persons who may swear to an *ex parte* affidavit in support of such a charge, the truth of which he explicitly denies on his oath ? I am not prepared so to hold. The applicant has it in his power to bring the charge to a judicial investigation in a more satisfactory way than by affidavit, and I think I must leave him to do so before I give him the relief he seeks. The motion must, therefore, be refused. As I express no opinion on the contradictory affidavits before me, I think I ought to make no order as to the costs of the motion.

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October 2, 1866.

HARRISON V. SHAW.

*Legatees.*

Legatees are not necessary parties defendant in an administration suit.

This bill was filed for administration of the estate of Consider Shaw.

*Mr. Wood*, for plaintiff.

*Mr. J. Hoskin*, for infants.

*Mr. E. Henderson*, for other defendants.

The testator by his will devised his lands, subject to a life estate, which he gave his widow, to two of his children, and to his other children he gave certain legacies ; the plaintiff made not only those having the legal estate but also the legatees parties by bill.

MOWAT, V. C., held that the latter were improperly added, and refused so much of the costs as were occasioned by making them parties.

**ALCHIN V. BUFFALO AND LAKE HURON RAILWAY COMPANY.**

*Abatement of suit—Changing solicitor.*

A suit does not abate by the death of one of the plaintiffs, if others remain on the record having similar interests, and capable of maintaining the suit. If a firm consisting of two or more partners are retained, and one dies, it will be assumed that the retainer continues to the surviving partner or partners.

This was an application for a sequestration against the defendants, the railway company, for non-production of books and papers in the Master's office.

*Mr. Morphy*, for plaintiff.

*Mr. E. B. Wood*, for defendants.

THE SECRETARY:—To the granting of this application three objections are raised; the first, that the bill was originally filed by "Morphy & Hemmings, agents for Gilkison & Mallock," while the present proceedings are taken by "B. F. Fitch, agent for Geo. W. Mallock." Gilkison, it is said, is dead, whereby the retainer of the firm, Gilkison & Mallock, has expired, and no order has ever been taken out appointing a new Solicitor. It is, however, unnecessary to consider whether under the practice which has prevailed in this country, an order to change the Solicitor in a cause is absolutely necessary, there being no general order of the Court requiring it, or what effect the death of one partner has on the retainer of a firm, because on the death of the Solicitor in a cause no order has ever been necessary to enable the clients to appoint a new one. *Whalley v. Whalley*, 22 L. J., Ch. 632. So that even admitting the death of Gilkison to have had the effect contended for, no order was necessary to appoint another in his place. It must be assumed that Mr. Malloch has been regularly authorized to act as the plaintiff's solicitor, and the defendant cannot call for production of his authority. *Chisholm v. Sheldon*, 1 Grant 204.

The second objection that the other defendants should have been served with notice of the present proceedings, is not entitled to any weight.

It is urged because it is said the decree was considered, documents produced, and the reference partly proceeded with some years ago, while the Master is now proceeding to consider the decree again—to do in fact what was done years ago. This is not the case; the warrant is, it is true, as usual in the form, "to consider the matters" referred by the decree, but it is underwritten "to proceed with the hearing," and also appoints a day for the production of certain specified documents. It is not denied that papers were produced, or, at all events, that they were inspected by the plaintiff's solicitor some years ago, but since then they have been, and it is not denied they are now in the possession of the defendants, and the object of the present application is to have them again brought before the Master, for the purpose of proceeding with the reference.

The third objection is, that the suit has abated by the death of one of the plaintiffs, by assignments of their interests made by some, by assignments made under the Insolvent Act by others, and by the death of a defendant.

The death of the defendant certainly has not abated the suit, because he was only one of the three co-trustees, and the interest vested in him as such has survived to the other two, who are also parties defendants.

It is alleged, in answer to the objection as to the changes among the plaintiffs, that although the suit is not formally one by several creditors on behalf of themselves and all others, yet the effect of the decree which has been made in the suit is to render it in fact such. This seems correct; the rule appears to be that when a suit is instituted by several plaintiffs, having distinct interests, the death of one or more of them, though it may in a sense abate the suit, yet when there are parties left on the record capable of maintaining the suit without the joinder of those who have died or their representatives, and the interests of the parties are not materially affected by the absence of those who have died, it is not necessary to revive. Now, here, the plaintiffs who remain on the record can maintain the suit, and the decree cannot be worked out without notifying the representatives

of those who are dead, and giving them an opportunity of proving their claims before the Master along with the other creditors who were never parties to the record, so that they are not in any way injured by permitting the suit to proceed. And neither are the defendants, because on taking the account in the Master's office, every defence to the claims of these parties, when their representatives come in to prove as creditors, will be open to the defendants, and they will be deprived of no defence which would be open to them were the suits revived, and such representatives named as parties to the record.

As no cause was shewn to the motion beyond these objections, and they are overruled, the application for a sequestration must be granted.

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#### BANK OF MONTREAL v. POWER.

*Amending bill after decree.*

On an application *ex parte* for leave to amend, after decree, by correcting the description of the mortgaged premises. *Held*, that the application could not be granted *ex parte*, and *quære*, whether a bill can be amended at all after decree. In *Barrett v. Gardner*, Cham. R. 344, the Chancellor refused leave to amend, whilst in *Foy v. Spafford*, Mr. V. C. Sprague granted it. Under the circumstances

THE SECRETARY refused the application.

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#### IN RE KERR, A SOLICITOR.

*Taxation—Costs of—Where party does not appear.*

A Solicitor applied for and obtained an order under Constat. U. C., ch. 35, sec. 29, for the taxation of his bill of

costs against his client. On the taxation being proceeded with, before the Master, the client did not attend, nor did any one on his behalf. The Master having refused to tax the Solicitor, the costs of the taxation, an application was now made to have these allowed. *Held*, that the Court had no discretion as to allowing costs of taxation, when the party chargeable with the bill, neither obtains the order for taxation, nor attends the taxation under an order obtained by the Solicitor. Section 33 does not confer upon the Court the power of awarding costs when the statute has directed that none shall be allowed, but only gives the Court the power of making special orders as to the costs, where such costs are payable.

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#### EDWARDS v. BURLING.

*Infants—Sale.*

It must appear clearly that the Master reports a sale to be beneficial for infants before a final order for sale will be made.

The decree directed a reference to the accountant "to enquire and state whether a sale or foreclosure would be more beneficial to the infant defendants."

On an application by the plaintiff, after default in payment, for a final order for sale, the motion was refused, because, although from the mode in which the accounts of incumbrancers' claims were taken and payment thereof directed, it might be inferred that the accountant intended to find in favour of a sale; yet the report did not find in favour either of sale or foreclosure, but was wholly silent as to which would be more beneficial.

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**SAUNDERS v. FURNIVALL.**

*Production of documents—Partnership.*

A plaintiff seeking to establish a partnership, is not bound by the defendant's view of the relevency or otherwise of papers which he seeks, and although the defendant swears positively that the papers have no bearing upon the case made by the bill, the Court will order their production.

This was an application on behalf of plaintiff for an order that the defendant do produce certain documents admitted in his affidavit on production to be in his possession, but which he (defendant) claimed did not in any way impeach the defence, but support the defendant's case, and which he contended he ought not to be required to produce.

*Mr. Smart*, for plaintiff, urged that a plaintiff seeking to establish a partnership, is not bound by the defendant's view of the relevency of the papers which he seeks, and cited *Farrice v. Attmool*, 14 L. T. Rep., N. S., 278 Ch.

*Mr. Hoskin, contra*, read the defendant's affidavits, in which it was sworn that the papers had no bearing on the case.

MOWAT, V. C., made the order for production.

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**YALE v. TOLLERTON.**

October 16, 1866.

*Insolvency Acts.*

Where, previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit in Chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity; the assignee in insolvency moved that such moneys be paid into Court, for the benefit of the general creditors. It was held that such lands were subject to the order for sale, and the motion refused with costs, but the assignee was considered entitled to his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors.

In February, 1866, defendant committed an act of insolvency, by making a deed of assignment.

Plaintiff recovered two judgments and writs against lands on both issued, and while they were both current, and in the Sheriff's hands, and on the 10th January, 1865, plaintiff obtained a decree referring it to the Master to take an account of what was due to plaintiff on the judgments, and that unless defendant paid the amount so found due, on the day appointed by the Master, certain land, of which the defendant was owner in equity, though not in law, viz.: East half of Lot No. 3, in the 6th concession of East Oxford, was ordered to be sold, with the usual directions.

The Master made his report on the 25th August, 1865, finding the amount due, and directing it to be paid on the 26th February, 1866. At the date of the Master's report both the writs against lands were still current, and in the Sheriff's hands, according to the defendant's petition: and on the 26th February, 1866, one of them was, according to the petition, still alive by renewal; but the other had expired. According to the case *Bank of Montreal v. Taylor* 15 C. P., U. C., 107, the renewal writ was not in force, as not having been renewed in time: but it is clear that both the original writs were in force and in the Sheriff's hands at the time of the decree.

The renewal writ being still alive, the said lands on the 14th of April, 1866, under an order of this Court, made on defendant's default, were sold to one Slawson, who has paid into Court about \$176, and paid to the plaintiff the balance of the purchase money. A petition was presented to compel Slawson or the plaintiff to pay into Court the amount so paid by Slawson to plaintiff, on the ground that the estate of the insolvent being vested in the petitioner as his assignee, prior to the sale or any order therefor under the decree, the plaintiff could not enforce the latter for his own benefit against the specific lands charged by the decree with the debt; but that the same became assets for the benefit of all the creditors.

*Mr. Bain*, for petitioner.

*Mr. Strong*, Q. C., contra.

THE CHANCELLOR.—I think that by virtue of the decree, the lands mentioned became specifically charged with and subjugated to the payment of plaintiff's claim as found by the Master; but, I apprehend, to no greater extent than would be goods and chattels at law in the actual custody of the Sheriff under a writ of execution, or lands seized by him and advertised for sale as the writ against lands before then general, became by seizure fastened upon particular property. Under the 7th subsection of sec. 2 of the Insolvency Act of 1864, as extended by the 12th section of the Act of 1866, the property of the insolvent, though under seizure on a writ of execution, so long as it is not actually sold by the Sheriff, passes to the assignee, save as to the property seized before the passing of the Act; for I take this to be the effect of the provision, that the 22nd clause "shall not apply to any writs of execution now in the hands of the Sheriff." I consider that the lands here ordered by the decree to be sold, in case the plaintiff did not pay by a certain day, were as much under seizure as lands held by the Sheriff for sale under a writ of execution at law. In either case, the party liable to pay could, before actual sale, have freed the land by paying off the debt; but the defendant here could no more have sold the land freed from the charge created on it by the decree, than a defendant on an execution at law could have sold lands seized by the Sheriff under such execution, freed from its operation. If this be so, the same effect must be given to the Insolvency Acts in the case of such a decree of this Court as of an execution at law; for it is only by analogy, and by applying the principles and spirit of the Insolvency Act to proceedings in equity to procure a sale of lands there that this 22nd clause applies. Proceedings in equity are not referred to in it, nor is there any language in any of the sections on this head which distinctly names them, though the 17th section of the Act of 1865 would embrace them under the words, "or other order of any competent Court." Had the 7th sub-section of section 2 of 1864 stood alone, it might be a question under its language, whether all the land of the insolvent, though de-

creed to be sold or under seizure at law, did not pass, as it is still his land till actually sold. But if we apply this section to lands charged in equity, so must we apply the saving provisions in the 22nd clause of 1865, and the result would then be that the land here did not pass to the assignee, as the decree, and, indeed, the Master's report were made before the passing of the Act of 1865, which excepts from the operation of sub-sec. 7 writs of execution then in the hands of the Sheriff. I think secs. 16 and 17, taken together, do not apply to the sale made here, and that sec. 17 cannot apply as to the distribution of money made by sales in cases to which clause 22 or sub-sec. 7, as extended by it does not apply. The Legislature evidently intended that parties having writs of execution in the Sheriff's hands at the time of the passing of the Act of 1865, should be allowed to proceed with them and have the benefit of them, notwithstanding any assignment made subsequent thereto and before the sale; and it would be inconsistent with the intended benefits, to apply to such cases clause 17. I have already said that property ordered by the decree of this Court to be sold, is to be treated as regards those acts, in the same position as property held under execution-at-law. I think the petition must be dismissed with costs, but it is a case in which the assignee should be allowed his costs out of the estate, as the question was new and a proper one for him to raise in the interest of the general creditor.

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#### KIRCHOFFER V. STAFFORD.

*Pro confesso proceedings.*

After a lengthy period has elapsed since the day appointed for payment, it is necessary to give notice of the motion to take pro con.

On a motion for final order for foreclosure in a *pro con.* case, it appeared, that a period of two years had elapsed

since the day appointed for payment. It was held requisite to give notice of the motion by personal service on defendant.—THE SECRETARY.

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### MILLS v. DIXON.

*Pro confesso proceedings.*

The report of the Master must be filed before the day appointed for payment.

On a motion for final order for foreclosure in a *pro con.* case, the report appeared not to have been filed until after the day mentioned for payment had passed, when the plaintiff waited fourteen days that it might be confirmed and then moved. It was held irregular, and that a new day for payment must be named.—THE SECRETARY.

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### MORPHY v. FEEHAN.

*Attachment.*

Motion for attachment must be on notice.

A motion was made *ex parte* for an attachment where a receiver had been ordered to make certain affidavits within a limited time and had failed to do so. It was considered that notice must be given.—THE SECRETARY.

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### GRAHAM v. CHALMERS.

*Lis pendens.*

Where a decree on further directions had been registered against the lands of a defendant, and afterwards the original decree was reversed on rehearing, the Chancellor held that the order reversing the original decree destroyed the lien,

but that the Court could not make an order directly affecting it, observing on an application to discharge the lien created by the registration that the Court cannot discharge a *lis pendens* in this manner, the only way of getting rid of which is to obtain an order dismissing the bill.

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### EMES v. EMES.

#### *Carriage of decree.*

Application in Chambers by defendant for carriage of decree, the plaintiff, who was entitled to it, not having gone on within the fourteen days, &c.

*Mr. Blain* for plaintiff, objected that the Registrar would draw the decree on application to him without an order to do so. This motion was unnecessary. *Taylor's Orders*, 136, and *Daniell*, Ch. Pr. 780.

*Mr. A. C. Chadwick* in reply—The authorities of *Daniell* and *Taylor* are inconsistent with our General Orders of 1858, ch. 42, sec. 1.

*Mowat*, V. C., held that this application was properly made to the Court in the first instance.

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### RICHARDSON v. BEAUPRE.

#### *Pro confesso note.*

Defendant had been served with a copy bill for foreclosure, and had filed a note in Registrar's book under the orders of Court. The defendant obtained an order to produce upon *præcipe*—which

*Mr. Cattanach*, for plaintiff, now moved to discharge on the ground that such an order could only be properly obtained on *præcipe* where answer was filed.

*Mr. Edgar*, contra.

It was held, following a former decision of the Chancellor, that the filing such note was not an answer, and merely put in issue the amount claimed, and showed defendant's desire to be present at taking account in the Master's office; that the order to produce obtained on *præcipe* must be set aside, but that the plaintiff could always obtain such order on an *ex parte* motion on grounds shewn.—THE CHANCELLOR.

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#### SAUNDERS v. FURNIVALL.

*Interlocutory costs, filing bill of.*

When the Registrar is directed to fix the amount of interlocutory costs and to aid him in doing so, a bill of costs is prepared and taxed; the bill of costs should be filed.

In May, 1866, an order was made under which the defendant was to pay to the plaintiff the costs of an application which the Judge directed the Registrar to fix. For the purpose of so doing a bill of costs was prepared, by the plaintiff's Solicitor, and taxed by the Registrar. The bill was not filed.

*Mr. Wetenhall* applied for an order directing the plaintiff to place the bill of costs as taxed on the files of the Court.

*Mr. Smart*, contra.

The Registrar stated that in practice bills of costs of this kind, which were merely prepared for his convenience in fixing the same, were never filed.

**THE CHANCELLOR**—Although refusing the application on the grounds, which need not now be stated, directed that in future such bills should be filed when taxed.

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**YOUNG v. WILSON ET AL.***Substitutional service.*

When a defendant who was made a party in the suit in respect of a mortgage held by him upon the lands which form the subject matter of the suit, was out of the jurisdiction ; but, it appearing that his Solicitor had always had the mortgage in his possession, substitutional service upon Solicitor was allowed.

The defendant, Dunn, being out of the jurisdiction, the plaintiff examined his Solicitor, before one of the special examiners, as to the whereabouts of the defendants. It appeared from the depositions that the defendant was in the East Indies. The Solicitor had had no communication with him in respect of this suit, and held no power of attorney from him ; but he had in his possession the mortgage in respect of which it became necessary to make Dunn a party defendant, and always had possession of it from the time it was returned from the Registry office.

*Mr. Moss* moved for an order for substitutional service upon the Solicitor, citing *Hope v. Hope*, 4 DeG. M. & G. 342; *Cooper v. Wood*, 5 Beav. 391; *Hornby v. Holmes*, 4 Hare 309; *Crookshank v. Sager*, Cham. Rep. 202.

*Mowat, V. C.*, granted the order, giving the defendant six months from the date of service on the Solicitor, within which to answer the bill.

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***In re MORPHY AND KERR.****Bill of costs—Time for proceeding, &c.*

This was an application by Solicitors for order to tax costs against their clients. The bill was rendered on the 22nd of August, and the petition presented on the 22nd of September. *Held*, that the application was premature, as the month which the statute requires to elapse before a Solicitor can take proceedings to recover costs, must be reckoned

exclusive of the day on which the bill is rendered and the day on which the petition for taxation is presented. *Blunt v. Heslop*, 8 Ad. & E. 579.—THE SECRETARY.

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*In re CLARKE.*

*Administration suit—Evidence, &c.*

This was an application by a creditor for an administration order under Order XV. No evidence was furnished beyond production of a certified copy of the will, shewing the defendant to be executor. Held, that although strict proof of the claim, such as must be given in the Master's office, is not necessary, yet *prima facie* evidence of the applicant's having a right to call for the administration of the estate, must be furnished, and the motion was refused with costs.—THE SECRETARY.

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**BAILEY v. BAILEY.**

*Changing Solicitor.*

*Mr. Kingstone* for appeal.

*Mr. G. D'Arcy Boulton*, contra.

On an appeal from a Master's report coming on for hearing, it was objected that the Solicitors appealing were not the Solicitors who proved the claims before the Master. Held that the Solicitor might be changed without order—that being the practice in England, in 1837, when the English practice came into force here, and we having no order in our Courts to the contrary. If (as it was suggested), he had ever held differently in Chambers, it had been in consequence of the present English order (which requires an order for a change of Solicitor), having been cited to him as governing the practice here, which, of course, it does not.—THE CHANCELLOR.

## SAME CASE.

*Consent by Solicitor.*

**THE CHANCELLOR**—Although there may possibly arise cases of an extraordinary nature where it would be the duty of the Court to relieve the client from the consequence of his Solicitor's act, where the latter had acted fraudulently, and even to punish the Solicitor ; yet, ordinarily, the client is bound by any consent or arrangement which his Solicitor in good faith enters into with a view to the client's benefit, although it may be entered into without consultation with or instructions from the client.

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*Re BOULTBEE.**Taxing costs..*

Where a Solicitor's bill of costs has been delivered more than a month and no action brought, the client, if he desires a taxation, can not obtain an order for it on *præcipe*, but must apply in Chambers on petition ; but if he applies within the month, he can obtain the order on *præcipe*.

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**WADDELL v. McCOLL.***Extending time of payment for mortgage money.*

Where through the default of the defendant in payment of Mortgage, the plaintiff has had to raise money on security of the land, and very considerable delay has taken place before the application was made, and a final order for foreclosure had issued, the Secretary refused to set aside such order, and extend the time for payment.

*Mr. A. C. Chadwick moved.**Mr. Spencer contra.*

**THE SECRETARY**.—This is a foreclosure suit, in which the plaintiff obtained the final order of foreclosure on the 29th

August, 1866. The defendant moved to discharge that order and for further time to redeem.

Applications to extend the time for payment of mortgage money have always been favourably entertained by Courts of Equity, where a reasonable excuse is made for non-payment at the proper day, and where there is a fair prospect of the mortgagor being able to obtain money to pay the mortgagee's claim at the expiration of the appointed time. The present is not, however, an ordinary application to extend the time for payment. Here the mortgagor seeks to have the order discharged and for further time, not as an indulgence, but on the ground that the order was obtained improperly.

Three grounds are stated in the notice of motion and relied on.

As to the first, that the mrtgagee was in possession and accountable for the rents and profits of 1866, while no credit for these rents and profits was given, the facts seem to be that in 1864 the defendant leased the property in question to Andrew, a son of the plaintiff, on shares as it is called, the tenant agreeing to pay the defendant one-third of the annual profits by way of rent. This one-third, it is alleged it was agreed between the defendant and the tenant should be paid to the plaintiff, and to this he assented. That he did so he denies, and the son, the tenant, says that he and the defendant agreed to apply it in keeping down the interest on a prior mortgage in the first instance, and then any balance upon the plaintiff's mortgage. Now, even if the plaintiff did assent to this arrangement, I cannot hold that he thereby became a mortgagee in possession. A mortgagor having a tenant in possession of the mortgaged property might very properly instruct the tenant to pay over the rent to the mortgagee, to be applied in redemption of the mortgage debt; and the mortgagee might receive that rent regularly for a number of years without becoming a mortgagee in possession, or accountable for anything more than he actually received. To make him chargeable as a mortgagee in possession, I apprehend he must stand in a

position which would enable him to enforce payment from the tenant if payment be refused ; he must have power to distrain. Now, there is no evidence that the mortgagee was ever recognized or acknowledged by the tenant as his landlord. That the mortgagor charged the mortgagee with two sums of money, as the share of profits payable by the tenant, during the years 1864 and 1865, is not sufficient. The plaintiff says he resisted being so charged, and that but for the smallness of the amount he would have appealed from the report. The evidence on which the Master has based his finding may, or may not, have been sufficient to show that the plaintiff was chargeable with these two sums, and even if sufficient, he may have rendered himself liable to be charged with these in many ways, and still not have been liable for them as a mortgagee in possession. Certainly, there is no evidence in the present application which would warrant me in holding that he was.

As to the second objection—that there is in the plaintiff's affidavits, on which the final order was obtained, an interlineation or alteration, without deciding the question whether the alteration in the present case would vitiate the affidavit ; and avoid an order made upon it, I think the defendant is now precluded from taking any such objection, he having, after the final order, obtained from the Solicitor of the mortgagee, an extension of the time for payment of the money,—I must hold that he thereby waived any right to take such an objection ; perhaps, indeed, the right to take any of the objections which are now taken.

As to the third objection :—That the defendant was misled as to the time which he had for redemption—it is remarkable that the only person by whom he says he was misled was his own Solicitor, and for that, of course, the plaintiff cannot be held accountable. The report, it is true, is dated 27th February, 1866, and the day for payment of the money the 27th August, while the taking of the account was not completed, it appears, till the end of May. This, unexplained, would, of course, be a fatal objection to the report ; but it is explained, and explained satisfactorily. A defendant

may, of course, waive his right to six months for redemption ; and in the present case it appears from the affidavit of the plaintiff's Solicitor, which is not contradicted (though an affidavit is filed in reply), that the Master being prepared in February to make his report, the defendant applied for and obtained several adjournments ; to these the plaintiff's Solicitor objected, as delaying the suit, and it was agreed that the time for redemption should run from the 27th February, and that on this understanding the defendant obtained the adjournments, so that [the account was not finally closed until the end of May. The plaintiff's Solicitor also swears that the defendant was in his office both before and after the day fixed for payment, but never in any way intimated that he was misled, and I must say that I cannot believe that he was.

There has also been considerable delay in making the present application. The final order was obtained on the 29th of August last, and [notice of the present motion was not received until the 18th of October. It is true the defendant says he was negotiating with the plaintiff to be allowed to redeem, and that it was not till the second week of October, that these negotiations came to an end ; but beyond a bare statement to that effect in his affidavit, no evidence of any negotiations is furnished, and the only evidence of any such is contained in the affidavits of the plaintiff, who says the defendant's Solicitor applied to him shortly after the final order was obtained, and asked ten days time which was granted ; but that two or three days after that time he returned and told the plaintiff he need not wait any longer, as the defendant could not raise the money.

That the efforts of the defendant to raise money were unavailing, and that his letters as to the proposed loan from the Company in Toronto miscarried, is certainly unfortunate, but the misfortune cannot be attributed to the plaintiff. He, has in the meantime paid off a large prior incumbrance, and has himself, borrowed money on the security of the land, so that he at least, does not stand in the position he did when the defendant made default. After a careful perusal of the

affidavits and the best consideration I can bestow on the case, the only conclusion I can come to is that the application must be refused with costs.

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### SAME CASE.

*On appeal before the Chancellor.*

Nov., 1863.

Where the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damage he may have suffered, and where there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure.

THE CHANCELLOR.—I think that the Secretary on the materials before him, came to a correct conclusion. The motion was, and is, to discharge the final order of foreclosure, on the grounds, 1st—That the plaintiff was not charged with the year's rents and profits. 2nd—That the final order was irregularly obtained, the "Jurat" having had a line drawn through it, and the word "would" written over it; and for an order enlarging the time for the payment of the mortgage money into Court, and costs, the defendant having been misled as to the time of payment thereof, and report having been wrongly dated, and for the taking of a new account between the parties.

The only grounds on which the final order was impeached are the first grounds and the Secretary correctly disposed of them. The Court may, if it pleases, pass or allow to be filed an affidavit with an erasure. Whether the erasure had attracted the attention of the Judge or officer of the Court at the time the order was obtained, I cannot say, but it is too late for a defendant to take this objection after he had negotiated with the plaintiff on the assumption that the final order was regular, and that he was in default, and had paid nothing, to satisfy the Court, of which fact only was the affidavit required at all. On the appeal before me, the Solicitor for the company, from whom the plaintiff as owner absolutely of the property borrowed the money, appears and states that

the company are willing to release the plaintiff and accept the defendant as their debtor. The great difficulty, therefore, which lay in the defendant's way on the application to the Secretary is almost entirely thus removed. The defendant appears to have been making continuous efforts to raise the money since July last, and within five weeks or so of the final order being obtained, to have completed his negotiation therefor; still, on the orginal application, the plaintiff's proceedings appeared to be right, at least so far as they were impeached, and the defendant not being able to impeach the final order, and the plaintiff having, as owner of the property, acted upon it and changed his position, it seemed impossible all the time to interfere in defendant's behalf, however sharp the plaintiff's proceedings may have been, and however likely it was that the defendant might have mistaken the time fixed for redemption, as to which he probably could have made out a much stronger case than he originally did. Much of his affidavits in reply could not be read, as it should have formed part of the original case. Notwithstanding this offer of the company to release the plaintiff, I thought it right to afford him an opportunity to show how otherwise he could be damnedified by now letting the defendant in to redeem. He has filed an affidavit, sworn on the 12th instant, on this head, wherein he says, "that in applying for and obtaining (from the company) a loan, he actually and necessarily lost much time and incurred much expense." That he has purchased \$550 worth of sheep and cattle for the purpose of stocking said land, and paid for the same and placed them on said land since the time Dumble (defendant's Solicitor) informed him that defendant could not raise the money, and that he need not wait any longer; and, if obliged to give up the land, he will have no place for said sheep and cattle, and he will be obliged to sell and dispose of them in some way at a great loss, and that he has spent much time and incurred much expense in going about the country to purchase said sheep and cattle; that he has made preparations and arrangements for cleaning and draining a swamp on said land—for making a large new shed, and for purposes of general im-

ovement, and in consequence thereof he will sustain great loss if foreclosure be opened." In answer to this affidavit, are filed an affidavit by the defendants and the affidavit of three neighbours, showing that there are no sheep or cattle on the premises, and it would seem impossible such a large number as would be represented by \$550 in value could be there without the knowledge of these deponents, after the searching examination they have made. A cross-examination of the plaintiff would have been more satisfactory, but want of time is the excuse for this not having taken place—the plaintiff, however, has not answered these affidavits. In addition to the denial of the statements contained in them, it is to be observed—1st. That the plaintiff does not state when he made these purchases. It may have been while the motion was pending, and with a view to defeat it. 2nd. In an affidavit made in the matter on the 29th October last, the plaintiff swore that he was not then and had not been in possession of the property, or in receipt of the rents and profits—whilst in his affidavit, sworn on the 12th instant, he swears that he has placed the sheep and cattle on the land, and has no other place to put them, without explaining how he managed to get possession in the interval from the defendant's tenants, and although he complains in the same affidavit of the injustice of charging him with the rents and profits. 3rd. The lease to the tenant has two and a half years yet to run—and though the lease was made to the mortgagor, I must infer from the fact of the Master having charged the plaintiff with two years rents and profits, that he received them from the tenant under the agreement made by the tenant with the plaintiff, that he has thus confirmed the lease; if so, it is hard to believe that he purchased cattle to stock the farm, the possession of which he would have no right to for two-and-a-half years. He may have arranged with the tenant, but he does not say so. The same observation applies to the preparations for improvements. What these preparations are, whether they are more than mental designs or when made does not appear. I think I should not, under the circumstances, treat the alleged purchases and preparations as

an insuperable obstacle to relief. Considering that the defendant has been making efforts all the while, and had before foreclosure partially succeeded in raising the money to redeem, that from the report having been ante-dated some months, he may have been misled as to time; that he and his former Solicitor seem to have been acting independently and without consultation towards the last, in procuring the loan; that it would have been a matter of course, under these circumstances, to have given the defendant three months further time, had he come for it before the final order, and that the plaintiff can now be recompensed for all the damage he can, in my judgment, properly lay claim to; that the premises in question comprised a farm which the defendant has owned for upwards of thirty years—and has been valued at nearly double the amount due plaintiff; I set aside the final order, and grant the defendant one month in which to pay the money after the Master shall have made his report of the amount properly due and payable now to plaintiff; and, in ascertaining this, the Master will allow the plaintiff all that he has paid to the Loan Company, and interest thereon, and his costs and expenses in procuring a loan from the company, including a reasonable sum for loss of time—charging the plaintiff with any rents or profits he may have received since the last report; and on the defendant's procuring the plaintiff a release from the company, and paying the amount found due by the Master within a month (as that time would seem to be sufficient), plaintiff to re-convey. Defendant must pay the costs of, and incidental to the motion.

## ROSS v. ROBERTSON.

October, 1866

*Notice of motion to commit—Producing papers.*

The notice of motion to take an affidavit on production off the files and to commit for contempt should be served on the defendant's Solicitor, and not on the defendant personally.

Motions for orders to commit for non-production are properly made in Chambers.

A party parting with papers after service on him of an order to produce was ordered to produce them, to file a better affidavit and pay costs.

*Mr. Homested* moved to take an affidavit on production, &c., off the files, and that the defendant stand committed for contempt, on the ground that certain material allegations in the affidavit had been interlined and not noted by the commissioner before whom the affidavit had been made, and that the deponent had admitted that certain documents had been in his possession, but he had about a month ago given them to another party who required them in a cause, which, it was contended, was not sufficient excuse for not producing them.

*Mr. Cattanach*, contra, objected that the notice of motion had been served on the defendant personally; whereas the objections to the affidavit being purely technical, it ought to have been served on his Solicitor; and also that the giving the papers to the third party was a good ground for non-production, and that an order *nisi* could not have been obtained *ex parte* under the old practice in such a case; and that the motion to commit was clearly irregular. The applicants, if successful, could only have the affidavit taken off the files for irregularity.

*Mr. Holmested*, in reply, urged that the parting with the documents, after service of notice to produce, was a contempt of Court, and that the objection as to service was waived by counsel appearing for the defendant.

**THE SECRETARY.**—I think the notice of motion should have been served on the defendant's Solicitor, and not on the defendant personally. Order 31 of February, 1865, was intended to apply only in cases in which the order *nisi* could

have been obtained *ex parte*, and here the plaintiff could not have obtained such an order. He could only have moved upon notice for an order that the defendant should file a better affidavit. The defendant's Solicitor, however, appears, and besides raising the objection to the service of the notice, shows cause to the motion, so that I cannot dismiss it on the technical ground that the service was irregular. As to the second part of the motion, that the defendants have, after being served with the order to produce, parted with some of the deeds, I do not think that the mere fact of parting with papers, under such circumstances, a contempt of Court. It might be explained, but here the affidavit on production filed, does not give any sufficient excuse; nor does the defendant now offer any, though he was given an opportunity of doing so. As the affidavit is clearly imperfect, owing to the inter-lineation, and the defective jurat, and no explanation is given of how the deeds came to be parted with, I must order the defendant to supply a better affidavit and produce the documents, and also to pay the costs. The objection raised by the defendant that an order to commit cannot be granted in Chambers was not supported by any authority, and is contrary to the long established practice of the Court. Orders to commit for non-production having for a long time at least been always granted in Chambers.

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*In Re SHARPE.*

November 21, 1866.

*Insolvent Act—Appealing—Entitling papers.*

Where the affidavits on which an allowance of an appeal from a County Court Judge was sought were not entitled in any Court, they were not allowed to be read.

An objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal.

Where the appellant was described as Wm. Darling, and the opposing creditors appeared to be Wm. Darling & Co., it was considered grounds for refusing to entertain the appeal.

An appellant in Insolvency must apply promptly.

This was an application under the Insolvent Act for the

allowance of an appeal from the decision of Judge Boucher, of Peterborough, over-ruling the objections of William Darling & Co., of Montreal, opposing creditors, and granting an order of discharge to the insolvent. Notice of the application had been given within the eight days limited by statute, but it had stood over at the instance of the appellants, the opposing creditors, in order that they might cure some defects in their notice of motion by stating the grounds of appeal, and the materials upon which they rested their case.

The matter was brought forward before the Chancellor upon the amended notice.

*Mr. J. A. Boyd*, for the insolvents, made the preliminary objections, that the affidavits verifying the insolvent's examination for the purpose of appeal were not entitled in any Court, that it did not appear from the papers that the Judge had granted an order of discharge, and it was only from orders that an appeal was allowed, and either a copy of the order, or the nature of its contents, should be before the Court—(citing *Shirley v. Jacobs*, 3 Dowl, 101; *Stokes v. Grissel*, 2 C. L. R. 727)—and that it appeared that William Darling & Co. were the opposing creditors in the Court below, whereas the present appellant was William Darling, who was not shown by the papers to be a creditor at all, and at all events, if a creditor, was not shown to have proved his claim, citing *Re Monck*, 10 L. T. N. S. 634.

*Mr. J. B. Read*, for the appellant, contended that in fact William Darling was trading under the name of William Darling & Co., and that this could be inferred from the papers; that the written judgment of the County Judge was before the Court, in which he states his conclusion to be that he "cannot refuse to grant the certificate of discharge," and as to the affidavits, he submitted that the Act gave no forms for proceedings to appeal, and that if it was considered a fatal objection, he would ask to supply another affidavit, properly entitled.

THE CHANCELLOR said he considered all these objections

fatal. As to the first, it was well known that when a proceeding was in a Court, the affidavits and proceedings must be entitled in that Court; and the forms in the Act showed that such was the case; the affidavits therefore could not be read. It was also important for the Court to see the nature of the order granted by the Judge below. He had the power under the Act to grant an order of discharge, either absolutely or conditionally, or suspensively; and the form of the order might influence this Court greatly in case of an appeal therefrom. Nor did it follow, from the concluding words of the written judgment, that an order had been granted; the learned Judge may have reconsidered his reasons and changed his mind or delayed signing the order; it should, therefore, distinctly appear that an order had been granted, and the terms of that order should be shown. Again, the Court cannot assume that the appellant, William Darling, is the same creditor as William Darling & Co., the presumption would be the other way; and it is clear that unless a party appellant is a creditor who has proved his claim and has intervened in the Court below, he can have no right to come into this Court for relief. The intention of the Legislature in fixing eight days to apply for leave to appeal is manifestly with the design of having such matters properly disposed of. It may be that, had no previous amendments been allowed in this application, such an indulgence might now have been granted; but, it is too much now, after one opportunity of remedying defects has been given to grant another enlargement; especially when an entire reconstruction of the case would be required, as in the present instance. The application will therefore be refused with costs.

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1866.

MARSHALL V. BALFOUR.

*Entering pro con. note.*

*Mr. Fletcher* moved for leave to enter note *pro confesso* against Henry Lowther Balfour, and for order to answer

separately against his wife, Blanch Anne Balfour, these defendants living out of the jurisdiction. The leave was granted to enter the note, and the note was made.

The Registrar's clerk however refused to enter the note, saying that the General Orders of the Court did not authorize him to do so. The Secretary was of opinion that as the suit was one in which a *præcipe* decree must be issued, the clerk was right. However, on consultation with his Lordship the Chancellor, the Secretary directed the clerk to enter the note against defendant, H. L. Balfour.

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#### ARDAGH V. WILSON.

1856.

*Foreclosure—Subsequent encumbrancers.*

Where, by his report made under a foreclosure decree, the Master appointed a time for all the subsequent encumbrancers who proved before him to redeem the plaintiff, one of whom at the time appointed paid the amount and took an assignment.

*Held*, that the incumbrancers who could not redeem were entitled to three months' further time before the co-defendant could obtain a final foreclosure against them.

This was a foreclosure suit. By the Master's report a time was appointed for all the subsequent incumbrancers, of whom there were several, to pay the amount found due to the plaintiff. One of these incumbrancers paid in the amount and obtained an assignment from the plaintiff of his mortgage, and

*Mr. McCarthy* applied on his behalf for a final order of foreclosure against the other incumbrancers, who had not complied with the Master's report.

**THE CHANCELLOR.**—A final order cannot issue in the first instance, but a further period of three months' time must be given to the other defendants to redeem their co-defendants.

## CARR V. CARR.

1866.

*Interim alimony.*

In an alimony case where the marriage is admitted, or proved, interim alimony will be granted almost as a matter of course, and notwithstanding that defendant swears he is willing to receive and maintain the plaintiff.

*Mr. Spencer* asked for further enlargement. A week having been granted on a previous application, he proposed getting further affidavits corroborating answer.

The answer admitted the marriage, and that the wife was living apart. The enlargement was refused on the grounds that the evidence suggested would be no answer to the present motion.

*Mr. Fletcher*, for the plaintiff, read the bill, which set up cruelty and a refusal to provide for plaintiff.

The answer was very contradictory, and alleged intoxication, violence, and misconduct on plaintiff's part, and that defendant was willing to receive and maintain her.

THE SECRETARY considered that the plaintiff was entitled to interim alimony, and a reference to a Master to enquire what would be a proper allowance, regard being had, &c., was directed, and that the merits set up by the answer could not be considered, as that in fact would be trying the case on the present motion, but the plaintiff was put upon terms as to going to hearing.

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## JAY V. MACDONELL.

October 31st, 1866.

*Production of books and papers—appealing from Master's finding.*

*Sembler*—That appeals from the Master's ruling, as well as appeals from his reports, should be to the Court, and not in Chambers.

This was an appeal from the ruling of the Master in ordinary.

*Mr. Snelling* for the appellant (the plaintiff).

*Mr. Hector, Q. C., contra.*

The Bill was filed by the plaintiff as the official manager of the Times Assurance Company, against the defendant, who was employed in December, 1858, as the special agent, attorney and solicitor of the company, to wind up its affairs in Canada. The defendant died, and the suit was revived against his widow and executrix, and a decree pronounced for an account, a balance being claimed against the company. In his lifetime the defendant had made an affidavit on production, referring to his books of account and dockets, and protecting these from being deposited in Court by reason of their being in daily use in his office, but submitting to produce them on the hearing of the cause or the taking of the accounts. The books of accounts and dockets were those of his then firm (Messrs. Macdonald & Macdonell), and in these he had entered his transactions in winding up the company's affairs in Canada. The defendant, the widow, and executrix, had made an affidavit on production, denying having the possession, custody or control of these books in the form prescribed by the orders.

On the application of the plaintiff's Solicitor, the Master certified as follows:—"Proceeded with hearing on account of the defendant, Mary Catharine Macdonell. After receiving evidence as to several items, *Mr. Snelling*, Solicitor for plaintiff, applied to the Master to disallow the items in the defendant's account which had not yet been allowed, unless the defendant Mary Catherine Macdonell produced, or caused to be produced, the books of account and dockets in which the entries are made relating to such items.

"The Master (as to the items on which no evidence has been offered, and as to the items as to which evidence has been offered,) declines to do so, on the grounds, firstly, that the defendant, Mary Catherine Macdonell, filed on the fourth of June last, an affidavit on production in this cause, denying her having possession, custody, or power of any books, &c., as stated at length in such affidavit; and secondly, because

the plaintiff's Solicitor has waived his right to have such items disallowed on such grounds, by allowing the defendant, up to the present time, to go into evidence in support of such items, without insisting on such production.

"The Master considers that his allowance or disallowance of these items will depend upon the evidence adduced, or to be adduced."

From this ruling the plaintiff appealed on various grounds, and particularly on the ground that the deceased defendant, as a trustee, was bound to keep clear accounts and have them ready for production, to the *cestui que trust* on his accounting; that the defendant, as his representative, had a similar duty to perform, and that she ought to produce the books on vouching her account.

The CHANCELLOR, (without calling on Mr. Hector), held that the proper course was to have moved against the sufficiency of the widow's affidavit on production, and dismissed the appeal with costs.

It was also stated by the Court that all motions by way of appeal against the ruling of the Master must be made to the Court, and not in Chambers.

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Nov., 1866.

WEIR v. MATHESON.

*Bond for security for costs of appeal—Style of cause.*

A bond for security for costs of appeal should be styled in Court of Error and Appeal.

The style of the cause in the Court below, if adopted, should be the style in full, and the parties should be described as they respectively become appellants or respondents, but to carry out the view of the Court, as intimated in *Harvey v. Smith* (2 Grant E. & A. 480) they may be given in the same order as in the style of the original cause.

Mr. E. Henderson moved;

Mr. Cattanach, contra.

This was an application to take bond for security for costs off the files for irregularity.

1st. On the ground that cause is styled in the Court of

Error and Appeal, and not in the Court of Chancery. This ground was overruled.

2nd. That the cause is styled plaintiff and defendants, as in the Court below; while certain of the defendant's names are omitted.

**THE CHANCELLOR.**—The appellant has followed the style of cause in the Court below in consequence of the intimation from the Court in *Harvey v. Smith*, 2 Grant E. & A. 480. I think the second objection fatal. The style of cause is neither that in the Court below nor in the Court of Error and Appeal. The plaintiff professes to have given the style of cause in the Court below, but leaves out certain defendants. There is no such cause in the Court below. The plaintiff might have styled the parties appellant and respondents as they became in the Court above. There is no order of the Court of Appeal against this, but he cannot claim here that plaintiff and defendant are convertible terms for appellant and respondent, for the plaintiff Weir was not the appellant or party complaining in the Court above. A further affidavit may be filed on payment of costs.

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Oct. 1866.

**RICE v. GEORGE.**

*Dismissing bill—Laches, abatement and revivor.*

In a redemption suit where one of the two defendants had died, a motion was made on part of his executors and of another defendant to dismiss for want of prosecution; the same Solicitor appearing for both. Notwithstanding some delay on the part of plaintiff, which was not fully accounted for, the order was made in the alternative, that he revive and go to hearing on terms, or, be dismissed.

*Held*, in accordance with the decision in *Spawn v. Nelles*, Cham. R. 270, that a defendant is not obliged after replication filed, to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution.

**Semblé.**—Where a suit abates by the death of one of the defendants, the defendant may move to dismiss for want of prosecution without moving that he revive; but if deceased defendant and the surviving defendant be both represented by the same Solicitor, the order will be to revive or bill dismissed.

**Semblé also.**—A motion to dismiss will be entertained even after replication filed.

*Mr. Hector Q. C.*, moved to dismiss bill for want of prosecution on part of defendants, Cleghorn and John Agar.

The bill was for redemption, and was filed 12th June, 1855. Answer of the above defendants filed October, same year. They had all answered by March, 1856. Bill had been amended on notice on the 19th December, 1860. The causes had been set down for hearing in April, 1858; first replication filed August, 1857. The last on 5th March of present year.

*Mr. Hector* in support of motion, urged that great *laches* had taken place. Application for order to amend was made in 1860. Amendments allowed. The delay was not accounted for. Plaintiffs had been informed in March last that Scammon was dead, and an order of revivor could have been obtained then—Smith P. 647, *Bank of U. C. v. Nichol*, Ch. R. 295.

*Mr. Sullivan* contended that he was not called on to meet motion to dismiss; the motion should have been only that he revive or be dismissed. Defendants could not go behind death of Scammon to shew merits for dismissing. That there was no authority for dismissing bill after replication.

*Mr. G. Murphy* for plaintiff. This cause stands now for hearing. The delay has not been through not proceeding. Plaintiff could not proceed on account of abatement.—Dan'l 647. *Adamson v. Hall*, T. & R. 258.

*Mr. Hector* contended on the authority of *Williams v. Page*, 24 Beav. 490-654, that motion was regular. He moved for defendant Cleghorn, who was not an executor.

**THE SECRETARY**—This was a motion by Cleghorn and Agar, two of the defendants, on an order that the plaintiffs' bill might be dismissed for want of prosecution, or that the plaintiffs might be ordered to revive, one of the defendants, Benjamin Scammon, having died.

The bill was filed in 1855. The answers were all filed before 1857. Replication was filed some years ago, and the cause had been set down for hearing at the Spring sittings in Toronto in 1866, when the plaintiff's Solicitor became aware of Scammon's death. Although there had been great delay in the progress of the suit, yet the plaintiff's Solicitors were not solely to blame for it.

In answer to the motion it was contended for the plaintiffs that replication having been filed the defendants could not move to dismiss for want of prosecution, their only course being to proceed under Order 57, s. 6, and set the cause down for hearing. Also, that the suit having abated by Scammon's death, was an answer to the motion so far as it sought an order to dismiss, the proper motion in such a case being for an order that the plaintiffs do revive the suit within a limited time, and in default of their doing so that the bill be dismissed.

*Held*, in accordance with the decision in *Spawn v. Nelles*, Cham. R. 270, that a defendant is not obliged after replication filed, to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution.

Also, that while the only course open to the defendants on the death of the plaintiff is to move for an order that his representatives do revive the suit within a limited time, or in default that it be dismissed, and that on the death of a defendant the only course his representatives can take is to move that the plaintiff do revive the suit against them, or in default that the bill be dismissed. Yet the death of a defendant is no bar to a co-defendant moving to dismiss for want of prosecution. *Williams v. Page*, 24 Beav. 490.

*Hall v. Green*, 2 U. C. Jur. 42. In the present case, however, Agar, one of the defendants moving, is an executor of the deceased defendant, so that he cannot move to dismiss. Cleghorn appears by the same Solicitor, and seems on that ground also prevented from moving.

In *Winthrop v. Murray*, 7 Hare 150, it was held that a defendant who had filed his answer and was in a position to move to dismiss, could not do so if a co-defendant, appearing by the same Solicitor, had not filed his answer, and see *Rees v. Jacques*, 1 Grant 352.

The proper order therefore to make is that plaintiffs do revive and bring the cause on for hearing at next Term, and in default that the bill be dismissed, plaintiffs to pay costs of motion.

Dec. 1, 1886.

## WIMAN v. BRADSTREET.

*Affidavit on production—producing letters.*

Letters passing between agents of a party to the cause, although written as between themselves in confidence, are not privileged communications or protected from discovery—such letters are considered in the custody or power of the party in whose interest they are written, and must be produced.

Such party cannot withhold part of their contents by cutting out portions of the letters.

Mr. *Huson Murray* moved to set aside a sequestration issued for contempt in not producing books and documents.

Mr. *S. H. Blake*, contra.

The question turned on the sufficiency of the affidavit on production. This matter arose in an injunction suit brought to restrain defendants from publishing a certain book or mercantile directory, alleged to be copied from a similar book published by plaintiffs. The plaintiffs in this book had inserted the name of a village which had no existence, containing a fictitious description of parties said to be residing there, on purpose to see if defendants would copy such false description, which they did; the letters relating to this village the defendants refused to produce, and they produced other letters, out of which certain portions, on which were written the names of the parties from whom information had been obtained, had been cut.

Mr. *Murray* for the defendants contended that the letters in question passed between parties (agents for the defendants) who were not parties to the cause, and that they could not be made to disclose the contents of them, and that such documents as his clients were bound to produce, they had produced, and that, therefore, they were now entitled to have the sequestration discharged. He cited *Edmonds v. Lord Foley*, 10 Weekly Rep. 210.

Mr. *S. H. Blake*, for the plaintiff, urged that there was no compliance with the order to produce, and the documents

in question were not protected, the parties writing the letters were the defendants' agents, and, therefore, the defendants could control the letters. It was information to which he was entitled, and material to his case. If he knew the parties giving the information he could from these parties shew the truth of the allegation in the bill, and that to hold any other doctrine would be to render nugatory the whole jurisdiction as to the right to production, &c. He cited *Wigram* on Dis. 217 and 289.

**THE SECRETARY.**—In this case the defendants move to discharge a sequestration obtained by the plaintiff against them for non-production of books and papers, the order for production having now, as they allege, been obeyed. In answer to the motion, the plaintiff contends that the defendants have not produced certain letters, which, by their affidavit on production, they admit are in their possession, and that others, which have been produced, are produced in a mutilated form, portions of the letters having been cut out before production. The defendants seek to excuse themselves from production of the letters, which they have not produced, on the ground that they are not in their possession or under their control, but that they are the private property of their agent, written to him by a private correspondent of his own, and not by any one in the employment of the defendants. I do not think that the excuse is sufficient to protect the letters. The statement in the affidavit on production is—"We have been informed that our agent, who was engaged in getting up the manuscript of that part of our book which is in question in this suit, has in his possession some letters received by him from correspondents employed by him, and in particular a letter giving the information as to the place or village called Apricot; but that he declines to produce the same."

On the argument of the motion it was admitted that but for the agent having been employed in getting up the defendants' book, these letters would not have been received by him, and there is no pretence made on the part of the defen-

dants that it is out of their power to procure these letters and produce them. I must, therefore, hold that they are documents in the possession, custody and power of the defendants, and that they must be produced. As to the letters which have been produced in a mutilated form, the defendants say they have cut out the names contained in them, because they are letters sent by a travelling agent to the defendants' agent, at Detroit, and the names cut out are those of the persons who gave him information as to the standing of the various merchants in the towns he visited; and these persons gave the information sought from them under a pledge given by the defendants not to divulge their names, and that "It was under such agreement only that their said correspondent undertook to assist them in said work." I do not think I can attach any weight to this argument. The law knows no privileged communication except between a Solicitor and his client. The agent had no power by giving any such pledge to oust the jurisdiction of this Court to grant discovery, and if he were put in the witness box and examined, he would be compelled to disclose the names of the parties from whom he obtained his information. The argument that the names of these parties are their own property, and that therefore the letters containing their names are held by the agent as the joint property of these correspondents, so that the Court cannot order the production, when the latter are not parties to the suit, is unsound, and cannot prevail. Besides, these letters are not in the agent's hands, and by their affidavits, they are admitted to be the sole property of the defendants. The defendants are bound to supply those portions of the letters which have been kept back.

The order to produce not having, as yet, been fully complied with, I must refuse the motion with costs.

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Nov., 1866.

## ELLIOTT v. BEARD.

*Service.*

The service on a grown-up person must be at defendant's residence, and such person served must be a resident there.

In this case an application was made for an order allowing substitutional service of a notice of motion, under Order 13, section 3, to take the bill *pro con.* The service of the office copy had been effected by delivering it to, and leaving it with, a son of the defendant, at his place of business; no order for substitutional service of the bill had been obtained.

*Held*, that this was not sufficient service. Service of an office copy is to be effected in the same manner as service of subpoena to appear and answer was formerly affected,—(Order 9, sec. 4,)—where the service of the writ of subpoena was not personal, it was necessary that the service should be at the place where the defendant ordinarily resided, and the mere leaving the writ, or a copy, at a defendant's ordinary place of business, if he did not reside there, was not good service. The fact that the office copy was served on the defendant's son, it was considered, made no difference. To make service, even at the dwelling-house on a relative of the defendant's, good service, it was necessary that the relative so served should be actually a resident in the defendant's house. *Edgson v. Edgson*, 3 DeG. & Sm. 629; and see also *Dan'l*, p. 390; *Smith*, 244.—THE SECRETARY.

Nov. 8, 1866.

## TOTTEN v. MACINTYRE.

*Office copy pleadings.*

The order to furnish office copy pleadings, when demanded, is imperative, and the Court will enforce compliance with it.

Where a defendant had answered, and an office copy

answer had been demanded, but had not been furnished, the defendant afterwards moved to dismiss the bill. The order was dismissed with costs. The plaintiff then moved that defendant be ordered to furnish the copy of answer, and the motion was granted with costs.—THE CHANCELLOR.

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Nov. 8, 1866.

DAVY v. DAVY.

*Amendments.*

Amendments of a material character will not be allowed without prejudice to a pending motion for injunction.

On a motion for leave to amend, without prejudice, to an order *pro con.*, which had been taken, and to notice of motion for an injunction.

Mr. *Holmested*, contra, objected to such an order being granted, without prejudice to motion for injunction, and cited *Ely v. Wilson*, (1 Grant 103), and contended that such order could only be made where the amendments were not of a material nature, or to correct some clerical error.

In reply, it was urged that it was for the Court to say whether the amendments affected the motion for injunction. It could not be considered on the present motion.

The order was refused on the grounds that the amendments sought to be made could, under the old practice, have only been introduced in the form of a supplemental bill, and that if allowed it would in effect be hearing a motion for injunction in a different cause from that in which notice had been given and the *pro con.* order taken.

In another case, mentioned in the argument, an amendment was allowed, without prejudice, to a motion for injunction, where the amendment consisted only of the prayer for the writ, which had inadvertently been omitted.

*Ross & Lauder*, plaintiff's Solicitors.

## RE MORPHY AND KERR.

*Service of bill of costs.*

A Solicitor's bill of costs need not necessarily be served personally—service on one of several clients acting in conjunction by the same Solicitor, but not co-partners, is sufficient service on them all.

Service on a Solicitor appointed by the one of several clients who had been active in the suit, and through whom instructions therein had been given deemed sufficient service.

*Mr. Curran* moved to rescind an order made for taxation of a bill of costs, rendered by Messrs. Morphy and Kerr to Peter Westbrooke, for whom with several other parties, joint plaintiffs, the said firm had acted as Solicitors. The service of the bill of costs had been effected by serving the same on Mr. Valentine Mackenzie, a Solicitor, who was instructed by Peter Westbrooke to demand such bill, he, Peter, having been the active party in giving instructions and carrying on the suits on behalf of himself and the others.

*Mr. S. H. Blake* opposed the motion on the ground that the service was sufficient, and cited several cases which are referred to in the judgment.

**THE SECRETARY.**—This is an application to rescind an order for the taxation of costs between Solicitor and client. The order was obtained in Chambers on the 31st October last, on an application by one of the Solicitors—Mr. Kerr; and the grounds on which the present application is made is that the delivery of the bill was not such as to comply with the statute.

The affidavit made by Mr. Kerr was that he, "as requested by Peter Westbrooke, one of the plaintiffs, rendered a bill of costs for charges, disbursements, &c., by mailing the same on the 15th day of September, to V. McKenzie, of Brantford, acting for them; said McKenzie having first demanded such bill."

From the affidavit of McKenzie, filed on this application, it would appear that he had not authority from all the plaintiffs to demand such bill, and that he informed Mr. Kerr.

before the bill was delivered, that he would not accept it, and consent to an order for taxation being issued on *præcipe*, without express authority from all the plaintiffs. He says, however, that Westbrooke, one of the plaintiffs, and certain others of them, had certainly instructed him to demand a copy of such bill, and he does not deny that he had demanded it.

Westbrooke makes an affidavit, in which he denies that he had authority from all the plaintiffs to instruct McKenzie to demand the bill, and that he even informed Kerr that he had such authority; but he does not deny that he instructed McKenzie to demand the bill and to take steps to have it taxed, or that he had authority from some of the plaintiffs to do so.

From the affidavit of Kerr, filed in answer, it appears that the retainer of Mr. McKenzie by the fifteen plaintiffs was a joint one, that Westbrooke had the greatest stake in the suit, and was the most prominent man; that he took the most active part in giving instructions, and that all letters about the suit were addressed to him. He also says that McKenzie did not return the bill, and that he believes he communicated the receipt thereof to the plaintiffs. This McKenzie, in his affidavit in reply, denies, but the denial is peculiarly worded.

Kerr's statement is: "I believe McKenzie at once communicated his receipt thereof to the plaintiff," and the denial is worded thus: "I did not communicate the receipt of said bill of costs to the said plaintiffs in manner mentioned by said Kerr in his affidavit." He does not say he did not communicate it to some of the plaintiffs, or at all.

On these facts I think I must hold delivery of the bill was sufficient to satisfy the requirements of the statute. By the statute it is provided that no Solicitor can bring an action or suit for the recovery of his costs until one month after a bill, &c., "has been delivered to the party to be charged therewith, or sent by post to, or left for him at his counting-house or place of business, dwelling-house, or last known place of abode." and the wording of the English Act is quite similar. But personal service of the bill has never been required.

And surely, if a man can appoint a Solicitor to accept service of a bill of complaint, and defend a suit for him, or an agent to transact any of the ordinary affairs of business, he may appoint an agent to accept service or receive a bill of costs which his Solicitor is about to render. Accordingly, service on an agent has been held sufficient. *Vincent v. Slaymaker*, 12 East, 372; *Re Bushe*, 8 Beav. 66; *McGregor v. Keily*, 4 Exch. 801. In the present case there is no doubt Westbrooke authorised McKenzie to demand a bill of costs; but, it is said, even if he did, Westbrooke could not give sufficient authority to bind the others, for service on Westbrooke, personally would not have been sufficient; it would be necessary to deliver a copy to each of the plaintiffs, and I am referred to the statute, as showing this to be necessary in all cases, except when the clients are co-partners. I cannot find anything to warrant this in the statute; a long series of authorities show the contrary to be the case. *Mant v. Smith*, 4 H. & N. 324; *Spier v. Bernard*, 8 L. T. N. S. 396; *Daubney v. Phipps* 16, Q. B. 507, were cited, and, among others which I have found, *Oxenham v. Lemon*, 2 D. & R. 461; *Crowder v. Shee*, 1 Camp. 437; *Finchett v. How*, 2 Camp. 275. In the latter it is expressly stated that the plaintiffs sought to be charged were not co-partners.

From the affidavits filed, it appears that the clients charge their Solicitors with negligence, and there is no doubt the chief object of this application is to delay the taxation of costs until an action which the clients have brought can be tried. I cannot allow this to weigh with me. Negligence cannot in general be set up as a defence to an action for an attorney's bill. *Templer v. McLachlan*, 2 New R. 136; *Farnsworth v. Gerrard*, 1 Campbell, 38.

The application must be refused with costs.

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**MCALPINE v. YOUNG.**

*Settling new advertisement—Purchaser—Sale by auction.*

A Solicitor having the conduct of a sale, cannot withdraw the property offered after a bid has been made. His course would appear to be to move to open the biddings, if he has grounds for such a motion.

A sale had been ordered and duly advertised, and several persons attended, but only one bid was obtained—no written offer was taken—the plaintiff's Solicitor then assumed to withdraw the property for sale, and took steps to have it put up again at a future day, and proceeded to settle a new advertisement.

Mr. *S. H. Blake* moved to stay the settling of the advertisement, contending that where a bid had been made the plaintiff could not withdraw the property from sale; that the party bidding had certain rights which he was entitled to have protected—to allow the plaintiff to go on to re-sell would, in effect, be opening the biddings, which could only be done on an application made for that purpose, and an order made to that effect.

Mr. *Hodgins*, for the plaintiff, objected that the present motion was practically an appeal from the Master's ruling, the Master having decided on and sanctioned the proceedings for another sale; and that such a motion could, therefore only be made in Court and not in Chambers. That in fact there was no sale, no bid had been accepted, and no written offer or agreement to purchase within the statute existed.

It was held that the proceedings for new sale were irregular, and the plaintiff could not abandon the first sale under the circumstances, and the present motion was granted.

**SUBSEQUENTLY**

Mr. *Hodgins* moved to be allowed, on part of plaintiff, to

purchase at an advance on the bid made at the above sale.

Mr. S. H. Blake opposed and made a cross motion to confirm the purchase set up to have been then made.

No sufficient case was made to afford grounds for opening the biddings, nor any conclusive evidence of undervalue given, and the sale was therefore confirmed, and Mr. Hodgins' motion dismissed without costs.

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1863.

**STINSON v. MARTIN.***Taxation of Costs—Executors.*

An order having been made dismissing an appeal with costs to all parties, the Master refused to tax any but one set of costs of one of the executors, the executors having severed in their defence, and this executor was the partner of the Solicitor who acted for him. This ruling was appealed against, and in support of it, it was contended that the Master was bound to take notice of the fact of the relationship of the Solicitor and executor, without any special direction.

*Craddock v. Piper*, 1 Mac. & G. 664; *1 New v. Jones*, 3 P. W. 249; *Mor v. Froud*, 3 M. & C. 45; *Lyon v. Baker*, 5 DeG. & S., 622, were cited.

SPRAGGE, V. C., on a petition, made an order referring it back to the Master to tax the costs of each executor.

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1863.

**STINSON v. MARTIN.***Security for costs.*

An infant out of the jurisdiction petitioning for relief will be required to give security for costs.

A petition was presented by the guardian of an infant, to

be paid out of the estate certain sums expended in maintenance of infant. The petition shewed petitioner to be out of the jurisdiction of the Court, and a question arose as to whether the defendant was not entitled to security for costs.

*Atkins v. Cooke*, 3 Drew 694; *Cochrane v. Fearon*, 18 Jur., 568, were cited.

SPRAGGE, V. C., granted the order for security for costs on an *ex parte* application, and a motion to rescind such order was dismissed with costs.

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1863.

**LONG v. WILMOTTE.**

*Charities—Parties—Attorney-General.*

In this case a bill was filed to administer an estate and declare a legacy for religious purposes void. The trustees were made defendants, but a question arose whether the Attorney-General ought not also to have been made a defendant.—See cases cited *Story's Eq. Jus.*, 1163 and 1164.

ESTEN, V. C., held that the Attorney-General was a necessary party.

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1863.

**OLIVER v. DICKY.**

*Examination de bene esse.*

An application was made for an order to examine a witness *de bene esse* on account of ill health, and *Tomkins v. Harrison*, 6 Madd, 315; *Hope v. Hope*, 3 Beav. 317; *McKinnon v. Everitt*, 2. Beav. 188; *Bellamy v. Jones*, 8 Ves. 30, and *Ayckbourn's Prac.* 165, were referred to as showing that such an order would be made as of course.

SPRAGGE, V. C., granted the order *ex parte*.

1863.

**BURNS v. CHISHOLM.***Dismissing bill—Moving ex parte.*

Where defendant had moved to dismiss and plaintiff asked for time, and time was granted, and the plaintiff failed to proceed within the time given. It was held that the defendant could move *ex parte* for the order to dismiss.—V. C. ESTEN.

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1863.

**BANK OF BRITISH NORTH AMERICA v. McDONALD.***Mistake in report.*

In a foreclosure suit a judgment creditor proved in the Master's office £80 too much on his claim. The mortgagor did not appear in the Master's office, and some months after this defendant, the judgment creditor, had been paid in full the mortgagor discovered the mistake. An application was then made to have the amount overpaid refunded. It was contended that the report, so far as the claim of the judgment creditor was concerned, must be considered his report, and that the mortgagor was entitled to have it rectified with costs. *Landars v. Allen*, 6 Simons 620; *Taylor v. Baker*, 5 Price 306—were cited.

ESTEN, V. C., granted the application with costs. August, 1861.

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1863.

**LEISHMAN v. EASTWOOD.***Next friend.—Security for costs.*

When a bill is filed by a next friend, if he be not a person of substance, the plaintiff will be required to give security for costs.

This was an application made before answer by a defendant, a married woman, for security for costs.

The next friend appeared, in his own depositions, not to be a person of substance in the meaning of the rule.

SPRAGGE, V. C.—I think the application is in time; it is made by a married woman who has not answered, and before order obtained upon her to answer separately. The circumstances of the application being made by the same Solicitor as appears for her husband, who has answered, cannot, I think, prejudice her right. In *Wintrop v. Murray*, the application to dismiss was refused, because the Solicitor for the party who made it necessary knew, being Solicitor for another defendant, that the plaintiff was not liable to have his bill dismissed. I am not prepared to say whether the Married Woman's Act will make any difference upon this point in any case; but it is not shown that this plaintiff has any property in Upper Canada available for the payment of costs. Besides, in suing by next friend, the next friend should be a substantial person. The proper order seems to be to stay proceedings until the next friend be changed, or security for costs be given.

NOTE.—The proper order in such case seems to be to stay proceedings until the next friend be changed or security given.

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#### BEATON V. BOOMER.

December, 1866.

*Interest on moneys improperly retained.*

Where defendant had retained moneys, and did not show that he had deposited them for safe keeping or kept them in his hands unemployed, he was held to be properly charged with interest.

Appeal from the Master's report. The Master had charged as trustee, simple interest at 6 per cent. on moneys retained by him.

*Mr. Stephens*, for defendant, who appealed.

*Mr. Hodgins*, for plaintiff, *contra*.

THE CHANCELLOR.—I think upon the evidence the Master might fairly have decided that the defendant had appropriated

these moneys to his own use, it not being shown that he had deposited them for safe keeping, or retained them in his hands unemployed. I think the Master has, under all the circumstances dealt leniently with the defendant, and that his finding should not be disturbed.

Appeal dismissed with costs.

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#### HUNTER v. MOUNTJOY.

11th June, 1861.

*Addition and description of parties to a petition.*

A petition should set out the addition and description of the petitioners in the same manner and with the same certainty as a Bill of Complaint.—V. C. SPRAGGE.

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#### REID v. COOPER.

9th October, 1860.

*Purchaser of equity of redemption—Final order of foreclosure—Setting aside.*

Where a purchaser of the equity of redemption paid amount found due to plaintiff, it was held that this was a payment by defendant, or some one on his account, and the final order of foreclosure set aside.

An application was made by petition to set aside a final order of foreclosure by the purchaser of the equity of redemption, on the grounds of payment by him of the amount found due to the plaintiff. This application was resisted by the plaintiff on the ground that petitioner had purchased such equity of redemption subsequent to the institution of the suit, and the decree directed that the payment should be made by the defendant, or some one on his behalf, and that this payment was not made on his behalf, *Hilliard v. Campbell*, 7 Grant 96; *Booth v. Cresswicke*, 8 Simons 352; *DeFeuchères v. Dawes*, 11 Beav. 46, were cited.

SPRAGGE, V.C., granted the application with costs.

## BERNARD V. ALLEY.

December, 1866.

*Payment out of mortgage money paid into Court.*

Where defendant refused to consent to payment out of mortgage money, plaintiff obtained order for such payment, but at his own costs.

The amount due to plaintiff on his mortgage had been ordered to be paid into the Bank, and had been paid in accordingly. Afterwards the plaintiff's Solicitor obtained from his client, at the request of the defendants, a discharge of the mortgage, and then applied to the defendant's Solicitor for a consent to obtain the money out of Court. This request was refused.

*Mr. Rae*, for plaintiff, moved for payment of the money out of Court, and that the defendants should pay interest from the day they had been notified of the discharge of mortgage being ready, and the costs of the motion, citing *Weeks v. Stourton*, 11 Jur. N. S. 278.

*Mr. McCarthy*, contra, contended that all the defendants had to do was to pay the money into the Bank; that they were not bound to give a consent, and that if the Court interposed obstacles to the plaintiff's obtaining the money, the defendant was not to be answerable.

THE SECRETARY granted the order for payment of the money, but at the plaintiff's costs, stating that the Court intended when the order for payment into the Bank was promulgated, the party paying in the money should have an opportunity of raising any objection to the payment out thereof (such as the non-delivery of the title deeds to which he might be entitled on such payment) on any motion the party entitled to the money might find it necessary to make.

## GALT v. SPENSER.

January 29, 1867.

*Security for costs—Setting aside.*

If a plaintiff residing out of the jurisdiction is shewn to have property in Upper Canada, an order for security for costs made against him will be set aside.

*Mr. Moss* moved to discharge two orders for security for costs. The orders had been obtained on *præcipe* on the usual allegation in bill that the plaintiffs resided out of the jurisdiction. In support of his motion, he read affidavits of one of the plaintiffs, stating that the firm of which he was a member had lands of the value of \$800 in Upper Canada.

*Mr. Spencer*, for defendants, urged that the plaintiffs had been guilty of *laches* in not sooner making this application, if he had merits to go on. The orders for security had been served early in December last. He referred to *Lillie v. Lillie*, 2 Mylne & Keen, 404. He contended that where plaintiff admits by his bill that he resides without the jurisdiction, it is for him to show something that would take him out of the general rule as to security for costs before he can be exempted from giving it, and the affidavits here did not do that. As to the ownership of land within the jurisdiction, the nature of their estate did not sufficiently appear, nor in whom the title was vested; and at any rate they might part with it at any moment. In *White v. White*, Cham. R. 48 relied on by the other side, the facts were different; plaintiff there was not all the time out of the jurisdiction, and his being within at any time was an advantage, as he might be examined as to his assets. He cited *Lucan v. Latouch*, 1 Hogan 248; *Lord Alboro v. Bourton*, 2 M. & K. 401; *Limerick, &c., Railway Co. v. Fraser*, 4 Bing 394; *Dickinson v. Duffil*, Chan. Cham. R. 108.

*Mr. Smart*, for defendant, Ketchum, contended that no general rule could safely be laid down, but each case must be decided on its own merits; and this was not a case in which the discretion could be properly claimed in favour of dispens-

ing with the security. He cited *Marsh v. Beard*, 1 Cooper's C. & P. R. 52 ; and *Harvey v. Smith*, 1 Cooper's C. & P. R. 31.

*Mr. Moss*, in reply, answered the objections as to the ownership of the land, which was sufficiently shown to be owned in fee simple by the plaintiffs. He relied on *White v. White*, and the practice at common law, which was invariably to refuse to make an order for security for costs when plaintiff had lands within the jurisdiction.

THE SECRETARY set aside the order for security. Costs of application to be costs in the suit.

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SEATH v. McILROY.

1867.

*Jurisdiction—County Court suit.*

Where the plaintiff's claim on the premises, together with the amount of a subsequent mortgage exceeded \$200, it was held to be beyond the jurisdiction of the County Court.

*Sensible.* The necessity for an order for substitutional service would appear to be sufficient reason for filing a bill in this Court which might otherwise might have been filed in the County Court.

This was a motion by defendant to dismiss the plaintiff's bill on the ground that the interest on the mortgage to foreclose which the bill had been filed had been paid since bill filed, and that the plaintiff was not entitled to any costs.

It appeared that the bill was filed to foreclose a mortgage for \$150, on which there was due for interest, when the bill was filed, \$19 30 ; that there was a subsequent mortgage for \$120 on the same premises, and that an order for substitutional service had been obtained by the plaintiff.

*Mr. Blain* for the motion. The suit might have been brought in the County Court, for that Court could have made any order which was requisite for the service of defendant, and neither the plaintiff's claim nor that of the subsequent mortgagee exceeded \$200.

*Mr. Kingstone*, contra. The suit could not have been brought in the County Court for—

1st—That the claim of the plaintiff, when added to that of the subsequent mortgagee, exceeded £200, and

2nd—The County Court could not grant an order for substitutional service; but such an order was necessary in this case, or it could not exist unappealed from.

The following authorities were cited on the argument: Cons. Stat. U. C., cap. 15, secs. 34, 63. *McLeod v. Millar*, 12 Grant 194; *Hyman v. Roots*, 11 Grant, 202; *Laurason v. Fitzgerald*, 9 Grant, 871.

THE SECRETARY, held that the bill was properly filed in the Superior Court, on both the grounds taken by the plaintiff's counsel, and therefore dismissed the motion with costs.

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#### CULLEN v. CULLEN.

March 11, 1866.

*Costs—Issuing fl. fa.*

It is irregular to take out a fl. fa. the instant costs have been taxed without allowing a reasonable time to the Solicitor whose client has to pay them to communicate the result of the taxation. A retaining fee of £5 is not taxable.

The taxation of the plaintiff's interim costs took place on Wednesday, 27th February last. On the part of the defendant a claim of set-off was made, and the parties differ as to how far the taxation was understood to be final. The plaintiff's Solicitor considered that it only remained open to give him an opportunity of applying to a Judge for an increased counsel fee on the argument in Chambers; and the Master must have been of that opinion also; for, on the plaintiff's Solicitor next day abandoning any claims for an increased fee, the Master completed the taxation and delivered out his certificate without any notice to the defendant's Solicitor.

On the other hand, the clerk of the defendant's Solicitor, who attended the taxation, swears that he understood the taxation was not to be closed without at least a verbal notice to him, and that he was desirous of getting his principal's instructions before the taxation was closed. It was the intention of the Solicitor to appeal against the taxation. Between 12 and 1 o'clock on Thursday, he received a note from the plaintiff's Solicitor, informing him that the costs had been "taxed at \$110 95, and *f. fa.* \$4." This was the first intimation that the defendant's Solicitor had that the taxation was closed, and the *f. fa.* had been issued before the note was written. Before two o'clock on the same day the writ was in the Sheriff's hands for execution.

V. C. MOWAT.—I think this haste was irregular. *Perkins v. The National Assurance and Investment Association*, (2 H. & N. 71); *Cruikshank v. Moss*, (8 L. T. N. S. 439; *Henry v. Commercial Bank of Canada*, (17 U. C. Q. B. 104), and that the writ must be set aside with costs, such costs to be set off against any costs which the defendant has to pay to the plaintiff or her Solicitor. I think the defendant's Solicitor was entitled to reasonable time to communicate with his client after the taxation was completed, and he became aware of the amount, that the plaintiff's Solicitor was over-zealous in taking out his writ instantly, and in delivering it to the Sheriff within an hour after informing the defendant's Solicitor of the costs having been taxed. To avoid unnecessary expense to the parties, I may state my opinion that the retainer of £5 to the Solicitor was not allowable, and that on the other hand this being an alimony suit, the defendant was not entitled to set off the costs of the abandoned motion; but was entitled to set off the costs of the enlarged motion in Chambers—the Secretary having allowed the enlargement on that condition.

## BELL V. WRIGHT.

January 19, 1866.

*Costs—When bill once taxed.*

The defendant is not entitled to the delivery of any bill he is not entitled to have taxed; and where a bill has been taxed it will not again be referred, even with other or subsequent costs, except on proof of special circumstances.

An application to tax costs should be on petition and not by motion.

This was a bill of foreclosure. The Master made his report therein under the decree on the 15th April, 1864, certifying among other things that he had taxed the plaintiff's costs at £13 17s. 8d. The defendant made default, and subsequent proceedings were had. On the 1st April, 1865, the defendant paid the debt and costs, namely, £13 17s. 8d. for taxed costs, and £20 19s. 9d. for costs between party and party subsequently incurred. No bill of the costs was rendered at the time. On the 5th December, 1865, the defendant demanded a bill of the costs paid. On the 11th January, 1866, a bill was rendered, commencing with the amount of the taxed costs, and not giving the particulars of it, but containing the items of the subsequent costs; and now the defendant moves that the plaintiff's Solicitor may be ordered to deliver a bill of the costs including the particulars of the taxed bill.

V. C. MOWAT.—I think this application must be refused. The general rule appears to be that a party is not entitled to the delivery of any bill which he has not a right to have taxed (see Lush's practice, 281, 282, 283), and I think this rule is applicable to the present case; there being no pretence that the defendant needs a copy of the bill, in order to ascertain whether it contains overcharges or not. There is no affidavit or paper filed, showing special circumstances entitling him to tax; and the 41st and 42nd clauses of the Act, respecting Attorneys-at-Law (Con. Stat. U. C. 22 Vic. ch. 35), expressly provides, that without special circumstances, no bill which has been paid, shall be referred for taxation; and no bill previously taxed shall be again

referred. As to what special circumstances are necessary or sufficient (see the cases collected in Lush's Practice, 279. Morgan & Davey on Costs, 323, and in Morgan's Orders, 3rd Ed., pages 14, 18 et seq.). The application seems also irregular, because made by motion instead of petition. (Morgan's Orders, page 22, Smith's Practice, 700 et. seq., 2nd Ed.); but this objection was not taken. The application must be refused with costs.

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### SMALL v. ECCLES.

January 27, 1867.

*Admission of evidence.*

The Court will not refuse to admit evidence recently discovered even after a cause has been set down for hearing on a petition of review. Where a cause is against the representatives of a deceased trustee, who had been defendant, the Court in its discretion will exercise a greater degree of indulgence in the reception of new evidence than if the original defendant himself, who should have known all the circumstances, was alive.

*Mr. Ferguson* moved to have admitted certain evidence of one Paul Davis after petition of review filed and set down for hearing, which evidence party applying had had no knowledge of until within a day or two; and to be allowed to amend the notice endorsed upon his petition accordingly, &c. The bill had originally been filed by *Small & Addison* against *Eccles*, deceased, a trustee to whom they had made an assignment for an account, &c.

*Mr. Strong, Q. C.*, opposed the application, and shewed that there had been several postponements of the hearing already, and much delay for the purpose of taking evidence. That what was sought now was to admit an affidavit, the expense of cross-examination upon which would fall on his client. It was not explained how this evidence of Davis was discovered, and why not sooner. That it was dangerous to allow evidence to be produced after the case of the plaintiff

was made, and to supply what he found to be lacking. No satisfactory proof of diligence to get such evidence had been shewn.

THE CHANCELLOR held such affidavits might be filed. If the original defendant was now living, who knew all the facts, and would from his own knowledge have been able to obtain the necessary witnesses, he would hesitate to allow it ; but he thought it right in the case of the representatives of a deceased defendant. He instanced the case of a bill filed to set up a receipt which had been found after a judgment at law obtained where relief was granted. He thought it right, however, to direct that Davis, the witness, should be brought up for examination before the Court—the petition to stand over in the meantime.

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#### VANWINKLE v. CHAPLIN.

February 2, 1867.

*Next friend—Security for costs.*

The next friend of a married woman who is co-plaintiff with her husband will be required to give security for costs if it appears that he is a person of no known means, and his residence not known—though it appears that the husband has a substantial interest and is not a mere formal party to the suit.

On a motion made for security for costs on the grounds that the next friend of the plaintiff, a married woman who was co-plaintiff with her husband, was a person of no means, and could not be found.

THE SECRETARY—I think the defendant entitled to security for costs, and to have the proceedings stayed until the security is given.

The next friend is described as of the township of Chinguacousy, in the county of Peel, yeoman. The defendant has made enquiry in that neighborhood of persons who are

acquainted with the residents in that township, and who are likely to know the next friend, if he really lives there, and is a man of substance; but no one knows him. I think the enquiries made by the defendant, and the result of these enquiries justify the present application.

On the part of the plaintiff an affidavit is filed by a clerk of the plaintiff's Solicitor, from which it is evident they have never seen the next friend, and know nothing about him, except that they believe his post office address to be Brampton, and that a letter addressed to him at Brampton will reach him.

I think the affidavits filed by the plaintiff should have been explicit as to the actual residence of the next friend and as to his being a man of substance. In *Oldale v. Whitcher*, 5 Jur. N. S. 84, V. C. Kindersley said, "if a plaintiff cannot be found when he ought to be forthcoming and is wanted, he must give security for costs."

As to the objection that there is on the record a co-plaintiff who is responsible for costs, without expressing any opinion, I feel bound by *Rann v. Lawless*, Cham. R. 333, where the Chancellor considered that the presence of a co-plaintiff made no difference. The other objection, that the notice of motion asks that "the plaintiff, J. A. B., as next friend," may give security, is not sufficient to entitle the plaintiffs to have the present motion dismissed. They cannot have been in any way misled by the words of the notice. The usual order must go.

NOTE.—This decision follows the authority of *Rann v. Lawless*, which has not been acquiesced in by the profession as sound law, the principle would seem to be that if the husband is a mere formal plaintiff security will be required, if a substantial plaintiff, otherwise.

## RE THOMPSON.

March, 1867.

*Taxation of Solicitor's costs—Settlement—Delay.*

In the absence of gross overcharge or pressure, the Court will not open up and tax a Solicitor's bill which has been rendered several years and treated as paid, the Solicitor having abandoned any excess over certain sums received by him.

The petition of the executors of Charles Thompson set forth:—That Charles McGrath, in the life-time of the late Charles Thompson, acted as his general attorney, and also after the death of the said Thompson continued to act for petitioners as such executors in many matters.

As such attorney, the said Charles McGrath had in his possession divers promissory notes, mortgages, and other valuable securities for money, and received considerable sums thereon.

No settlement of accounts has ever taken place between petitioners and the said Charles McGrath.

On the 28th of October, 1859, an order was obtained by one Herbert Biggar against your petitioners, for the administration of the estate of the said Charles Thompson in this Court.

The proceedings under the said administration order have been very long, owing to the estate of the said Charles Thompson being very large and the affairs complicated.

The said Charles McGrath rendered to one of petitioners, about the —— day —— 186—, a bill against the estate of the late Charles Thompson, for services rendered from 23rd January, 1858, to the 28th September, 1861, inclusive.

No step was taken by your petitioners for taxation of the said bill of costs, as your petitioners considered the matter was like all the other affairs of the estate in the hands of the Court.

The Master has now directed a taxation of the said costs, the said bill being filed in his office.

The said bill consists of an account of moneys paid and received by the said Charles McGrath, of services rendered

by him in various ways during the period embraced in the said bill, and also of bills of costs for services in thirty common law suits.

The total amount of the said bill is nine hundred and thirty-nine pounds, one shilling and two pence. Credit is given for cash received on certain securities for periods extending from the 5th February, 1858, to the 13th March, 1861, inclusive, and amounting in all to £696 19s. 10d., and a balance claimed of £242 1s. 4d.

Your petitioners cannot point to any items in the said bill which are of large amount and gross over-charge; but there is a very large number of small items which either ought never to have been charged at all, or if charged, to the extent of only about one-half or one-third of the amount claimed, and which items in the aggregate amount to a very considerable sum.

That after the said administration order was obtained the said Charles McGrath had no authority to receive any moneys on behalf of the said estate, if he ever had any, nor any authority to conduct any proceedings on its behalf.

They further believe that the said bill cannot be considered as properly rendered under the statute in that behalf, as neither the bill for general business nor the detailed bills in the common law suits are signed by the said Charles McGrath; nor were they accompanied by a letter signed by him as required by the statute; nor was the said bill or copy thereof, or any letter or notice referring thereto, ever served upon more than one of your petitioners.

The affairs of the estate cannot be properly wound up without an account of the promissory notes and other securities received by or dealt with by Charles McGrath. And prayed, That it be referred to the Master of this Court to tax the said bill of fees, charges and disbursements, or that the said Charles McGrath do deliver a proper bill, and that the same be taxed. That the said Charles McGrath and your petitioners may produce before the said Master, as he shall direct, all books, papers and writings in their custody and power, relating thereto and to the items of credit therein

contained, and may be examined concerning the same as the said Master shall direct, and upon payment by your petitioners of what may be found to be due to the said Charles McGrath upon such taxation; or if it shall appear upon such taxation that the said bill is overpaid, that the said Charles McGrath may be ordered to deliver to your petitioners, or to whom they may appoint, all papers, writings and documents in his possession or power relating to the matters connected with the said bill of costs; and that he may be ordered to refund or pay to your petitioners what shall appear to be due to them upon such taxation; and that the said order may contain all necessary directions.

In reply to the petition, Mr. McGrath filed the following affidavits:—

“That my bill of fees, costs and disbursements against the estate of the late Charles Thompson, mentioned or referred to in the petition in this matter, was delivered to the petitioner, John C. Griffith, one of the executors, on or about the 1st October, 1861, having either my signature subscribed thereto, or being accompanied by some letter signed by me, referring to the same as my bill, and for greater certainty I crave leave to refer to the said bill and letter in the custody or power of the petitioners.

“Without admitting that the said bill ought to have been served on both the executors, I say that shortly after the delivery thereof the executor, George Pomeroy Dickson, saw the same, and the said bill was subject of conversation on more than one or two occasions, between me and the said executors and their solicitor, W. V. Bacon, in and previously to the year 1861, and on one or two occasions was produced at that time, and referred to in the Master’s office, when the said executors and their said solicitor were present, and the matter of the said estate was being considered; and that on the last of the said occasions, when asked by the said W. V. Bacon what I intended to do as to said bill, I stated that I had never intended to hold the said executors personally responsible to me for said bill, and did not then intend to do so; neither did I think it worth while to make any

claim on the said estate for the balance due me on said bill, and would not do so, and that the said W. V. Bacon and the said John C. Griffith said that was quite satisfactory, and that therefore, as far as the said estate was concerned, the said bill was disposed of.

"That I have never demanded or claimed from the said executors, or either of them, the balance at the foot of the said bill, nor have I ever proved a claim under the administration order referred to in the said petition for the said bill of costs, or for any part of it, or for any services in the said bill charged.

"That in the course of the proceedings before the Master, under the said administration order, the Master, on the 6th June, 1864, made a direction with reference to the notes and securities in the said petition referred to, in the words or to the purport and effect of the paper now shown to me and marked with the letter "D." In pursuance of that direction, I carried into the Master's office, under oath, all the notes and securities then remaining in my hands, and accounted for all the others by shewing that I had given credit in the said bill of costs for the moneys realized from them, and I stated in my affidavit, then filed thereon, that I had made no claim for the balance appearing at the foot of the said bill.

"I then considered my bill of costs settled in that way, and I believe the petitioners considered the bill to be settled in that way, and I heard no more of it until about the 26th April, in last year, when I was served with a Master's warrant to tax the said bill of costs; an objection was made on my behalf before the said Master that he had no authority to tax the said bill without an order of the Court, and the proceedings under the said warrant were abandoned, and to the best of my knowledge or belief the said Master has done or directed nothing since in the matter.

"On the 7th of March, 1865, I received a letter from the petitioner, John C. Griffith, enclosing the cheque of the Canada Agency Association, for £5 15s. paid back by them on the item of £12 10s. referred to in the affidavit of the

petitioner, John C. Griffith, and paid to that company by me on the application for a loan to relieve the estate of the said Charles Thompson, which sum so much reduced the balance at the foot of the said bill, and that I have received no other moneys for or on account of any matters connected with the said estate since the rendering of my said bill."

*Mr. Rae*, on the part of executors now moved to tax these bills, and for an account of moneys received, &c., by McGrath.

*Mr. Crickmore*, for McGrath, contended that the understanding with the executors amounted to a virtual settlement, and the matter could not now be re-opened.

*Mr. Rae*, in reply, pointed out that the executors were called on in another suit of *Bigger v. Dickson*, to pass their accounts, and they would have to show that these bills had been properly paid after taxation.

**MOWAT, V. C.**—The Solicitor's bills were delivered on or about the 1st October, 1861, showing a balance in his favor of £242 1s. 4d. The last charge by the Solicitor in these bills was in 1859, and he appears to have done no professional business for the petitioners afterwards. In June, 1864, the Solicitor made an affidavit which was filed in the motion under the administration decree, stating that he made no claim for the balance of his bills, and he had stated the same thing previously to the acting executor, Griffith, and to the Solicitor who was attending to the administration suit on behalf of the executors. On the 28th January, 1867, the petition to tax was filed more than seven years after the relation between the parties had practically ceased, more than five years after the delivery of the bills, and considerably more than one year after the Solicitor had disclaimed any intention to hold the petitioners or the estate liable for the balance. The delay has thus been very great; but considering that the petitioners are executors, and that it was in that capacity the Solicitor acted for them (*Re Dickson*, 3 Jur. N. S. 31); that the administration suit was pending

at the time of the bills being rendered ; that the respondent was aware of this, and that the suit is not yet wound up.

I think it would probably be my duty to grant the order to tax, if a case of gross overcharge had been made out. But either gross overcharge or pressure is an essential element in the case of clients coming for taxation of their Solicitor's bills after so long a delay. The authorities appear uniform on this point. The rule on this argument is sufficiently clear, as Sir W. Page Wood pointed out *In re Strother*, 8 K. & J. 527 :—“To entitle a client to an order for taxation of his Solicitor's bill after the expiration of twelve months from its delivery, he must show one of two things, either pressure or gross overcharge, amounting to what the Court designates as fraud. Either of these being shown, the bills may be referred for taxation ; it is not necessary that both should concur.” Here pressure is out of the question. It is not alleged in the petition, and though it was argued that the evidence showed pressure, I am clear that it does not. Then the alleged overcharge is thus stated in the affidavit of Griffith :—“I am advised, and believe that there are no items in the said Bill which are of large amount and gross overcharge ; but that there is a very large number of small items which either ought never to have been charged at all, or if charged, then only to about one-half or one-third the amount claimed, and which items in the aggregate amount to a very considerable sum.”

Neither the petition nor the affidavit specifies the items alluded to, or gives the respondent any further information as to the objections which the petitioners now make to his Bill, nor is there any allegation of what the petitioners mean by “considerable sum.” The sum might be considerable and yet fall far short of the balance of £242 1s. 4d., which the respondent abandoned more than a year previously to the filing of the petition, if not at a much earlier date. I think the absence of any specification or proof of gross overcharge is fatal to the application. Refused with costs.

From this decision plaintiff appealed, on the grounds that

the affidavit was not in form sufficient to protect ; and secondly, that the letter was not privileged, but should be produced.

**THE CHANCELLOR.**—The affidavit on production admitting that the defendant had in his possession a letter from Charles Magrath to him, endeavours to excuse the production of it by saying that "It is a confidential communication between my former Solicitor and myself, relative to matters in which the said Magrath was then acting as my Solicitor." Every confidential communication between a man and his Solicitor is not privileged. The affidavit does not state that the letter relates to matters in dispute in this cause, excepting inferentially by means of the first paragraph of the affidavit of the defendant in which the deponent refers to the letter as "a document relating to matters in question in this suit." It does even allege that the matters referred to in the letter were in dispute at the time, or involved any opinion of counsel upon defendant's title, which he had a right to have protected. The communication may be of some fact merely come to the knowledge of Magrath, and communicated by him to the defendant, which the latter would be bound to disclose, and as to which there could be no protection. Many things pass between a man and his Solicitor which are not to be treated as privileged communications. The affidavit is not sufficient and the defendant must produce the letter unless he can file a further affidavit alleging sufficient excuse.

On the hearing before the Secretary the examination of the defendant on his answer was referred to, and it, taken with the affidavit, was held by the Secretary to show a sufficient excuse for non-production, on the hearing of the motion before me, nothing but the affidavit is used, and it alone I think insufficient. But in consequence of what occurred before the Secretary, and the ruling thereon had, I allow the time for a further affidavit ; the defendant first paying the costs of the application before the Secretary and before me.

A further affidavit was then filed, in which the deponent

stated "that the letter from Charles Magrath to me referred to, &c., bears date on the 5th day of December, 1856—I say that I object to produce said letter under the order to produce in this cause, because the same is and contains an opinion from the said Magrath, who was then acting as my Counsel and Solicitor in the matter of the purchase of the lands and premises in this cause upon my title to the said lands and premises, and because the same is a communication between myself and my Counsel and Solicitor relative to my said title, and I claim the same to be on these grounds privileged."

Another motion to commit for non-compliance with the order to produce was then made before V. C. MOWAT, who gave the following judgment:—"I think I cannot grant this motion consistently with the case of *Pearse v. Pearse*, before Lord Justice, then Vice Chancellor, Knight Bruce (1 DeG. & S. 12), and *Manser v. Dix*, before Vice Chancellor Wood (1 K. & J. 457). *Pearse v. Pearse* was approved of by the Master of the Rolls in *Ford v. De-Pontes* (5 Jur. N. S. 993.) There seems to have been no appeal in any of these cases, and no later case was cited to me. My brother Spragge pointed out, in *McDonald v. Putnam*, (11 Grant, 264), that the discovery sought being between vendor and purchaser upon a question of title, these decisions are not opposed to those of earlier date, on which he proceeded in the case before him, which was not one of vendor and purchaser, or title.

I must refuse the motion with costs.

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## RUTTAN V. LEVISCONTE.

January, 7, 1867.

*Redemption.*

Where there were several defendants interested in the equity of redemption of certain property, and one purchased up several outstanding shares of co-devisees also interested, and so dealt and acted that the other parties interested assumed that he intended to redeem for their mutual benefit, instead of which he arranged with the mortgagee to suffer foreclosure and then bought from him, it was held that he could properly do so for his own sole benefit.

The plaintiff had sold his interest in certain lands in Thurlow to one Benjamin Dougall, who mortgaged the same to him to secure the purchased money. Dougall sold to defendant Levisconte. Smith, a defendant, had purchased up the interest of several devisees under the will of a deceased owner in the same undivided property, and he entered into an arrangement with Levisconte to partition off the land, giving him such portion as he supposed him entitled to, and Levisconte undertook to pay off the Dougall mortgage which affected the whole of the property, and gave to Smith a mortgage on his (Levisconte's) share of the land as an indemnity against the Dougall mortgage, in case Smith should pay it. Ruttan proceeded to foreclose his mortgage, and the other defendants knowing that Smith held the chief interest, in the land, appeared to have relied on his redeeming it; instead of which he contracted with the plaintiff for the purchase of his interest, and then he suffered a final order of foreclosure to issue, after which the purchase was completed.

The defendants, other than Smith, then applied to open up the foreclosure and set aside the final order and to be let in to redeem. Smith, setting up that by his transaction with the plaintiff he had, in effect, redeemed the plaintiff, and could only require reimbursement, and could not hold the land absolutely as against them—and they urged that they had so considered throughout their dealings, otherwise they would have redeemed. The defendant Smith, they contended, was in the position of one joint-tenant who had redeemed for his own and the co-tenant's benefit; and that the purchase from the plaintiff did not alter his position. On the other

hand, it was contended that Smith bought for his own benefit unaffected by any trust; that the other defendants had ample time to redeem had they intended to do so, and that he could not be called on to redeem for the benefit of the other defendants, even had he redeemed the premises without purchasing, as he contended he did, an indefeasible title. The other points made appear from the Judgment.

*Mr. Blake, Q. C.*, appeared for the applicant.

*Mr. Strong, Q. C.*, and *Mr. Roaf, Q. C.*, for the other parties interested.

THE CHANCELLOR.—The right to relief on this motion was in argument based on three grounds:—

1st. That the conduct of Smith was calculated to throw off their guard his co-defendants interested with him in the equity of redemption, and to lead them to believe that if he redeemed it would be for their joint benefit.

2nd. That having taken from the defendant Levisconte a mortgage to indemnify him against the incumbrance held by the plaintiff, he (Smith) must be taken to have redeemed or got in the legal estate with reference to that indemnity and not for himself absolutely, and on being indemnified be treated as a trustee of the legal estate for Levisconte and others.

3rd. That he has brought an action of ejectment against Levisconte, in which he relies upon this indemnity mortgage as part of his title, and that, therefore, as against himself, he has opened the foreclosure obtained by the plaintiff.

As to the first grounds—No case at all is made by the materials on which the motion is based; but it is sought to supply these from statements in the affidavits filed in answer and reply. This cannot properly be done, even if such statements could be used to support the original case, I think they do not establish the position; the most they amount to is this, that several or all of the defendants having a common danger to avoid, viz.: foreclosure, trusted the one to the other to meet it, and that Levisconte, who ought by reason

of his undertaking to Smith to have been the foremost, and his co-defendant, Read, felt confidence that Smith, who had the largest interest at stake, would not suffer foreclosure, but would redeem in the benefit of which all hoped to partake. Instead of this Smith came to an understanding with the plaintiff, that he would purchase if the latter obtained foreclosure; and foreclosure having been obtained, he did purchase. In all this I see nothing wrong. He was under no obligation to redeem for the benefit of the others ; he never promised them that he would redeem ; he did not, so far as I can learn, in any way deceive them. They ran the risk, and of it must take the consequences. Levisconte had no right to expect Smith to redeem. It was his duty to redeem and protect Smith. More than six months after foreclosure had, he and his co-defendants come here for relief. I think that as a matter of fact they have shewn great indifference or negligence, and no excuse for it is offered. As to the other two grounds, if there be anything in them they must form the subject of a bill or independent suit ; I cannot give relief in respect to them on this motion. I do not think that because Smith took indemnity from Levisconte against the plaintiff's claim he can be in a worse position now, having had to submit to that claim, then if he had taken none. At all events, I do not see how Levisconte, who did not indemnify him at the proper time and in the proper way, can say so. The use which Smith makes of the indemnity mortgage may not according to circumstances, have the effect of raising an equity in Levisconte's favour ; but any such equity must become the subject of a fresh suit. I refuse the motion with costs.

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## WORTS V. HOW.

*Filing supplemental answer.*

A supplemental answer will be allowed to be filed to correct an error in the original answer, or state some facts discovered since answer filed, although some delay has taken place since the discovery of the new matter; and all the more readily if the plaintiff has himself not been urgent in pressing the cause.

*Mr. Crooks*, Q.C., applied for leave to file a supplemental answer. It appeared from the affidavits that the defendant's defence rested on two certain documents, one of which was alleged to have been given as security only, though apparently absolute, in setting out this case, the solicitor by mistake had alleged the deed confessedly absolute, was that which was intended and given as security, and the defendant had sworn to the answer supposing that the version given by the Solicitor was the correct one. The supplemental answer sought to correct this error, and also to set up some new fact occurring since the former answer was filed.

*Mr. Crooks*, Q. C., in support of the motion urged the materiality of the new matter, and referred to *Cherry v. Morton*, Ch. Rep. 25.

*Mr. Hodgins*, contra, pointed out that great delay had taken place in making the motion. That the matter sought to be introduced must have come to the knowledge of defendant's Solicitor long prior to his making this application, and that if new answer allowed, it would render necessary an amendment of the bill, and delay the cause, and referred to *McAlpine v. How*, 9 Grant, 372.

THE SECRETARY.—The defendants apply for leave to file a supplemental answer to correct an error in their original answer and put on the record circumstances which have occurred since the original bill was filed. I think it was their duty to have applied at an earlier date to correct their original answer, in respect of matters which they had in error sworn to, and which they had discovered to be untrue; but I think I cannot, on account of their neglect prevent them

from placing on record the facts they now seek to bring before the Court. I do not think that leave being given to file the proposed supplemental answer will prejudice the plaintiffs, but even if it prevents their going down to a hearing this term, they have already allowed the suit to sleep for nearly if not quite five years, so that the delay of a few more months cannot seriously affect their interests. The defendants who now apply must pay the costs of this application, and if the plaintiffs really require to amend, they must undertake to pay the plaintiffs and the other defendants the costs incurred by reason of the cause having been set down for hearing at Guelph.

The matter subsequently came before the Chancellor on appeal. It appeared that the bill was filed on the 11th May, 1861. The answer in due course. Order of revivor, 25th October, 1866. Leave to defendant to file supplemental answer, 20th November, 1866, after notice of hearing had been given.

The order to amend was made on the 4th of February. Office copy amended bill demanded on the 8th February, and served on the 16th February. The order to amend was the ordinary order on *præcipe*.

*Mr. Crooks, Q. C.*, appealed from the order of the Secretary, refusing to set aside as irregular the order to amend, contending that the demanding the office copy of a bill is no waiver of an irregularity in the order to amend, as defendant might desire to see the extent of the amendments, and would perhaps then not object to them. *Lush's Prac.* 441, 442—2 Daniel, 724, 729, 790, 792. The order here was void, as the Deputy Registrar had no power to make it, but the defendant might not choose to object if the amendments were harmless. *Macnamara on Nullities*; *Woodward v. Twynaine*, 9 Sim. 301; *Levi v. Ward* 1 S. & S., 334; *Attorney-General v. Shield*, 11 Beav. 441. The amendments are not such as the Court would have permitted. *Taylor* 61, 62. It raises a new issue by way of amendment.

*Dennison v. Curtis*, 11 L. T., N. S. 671; *Know v. Gye*, 10 Jur., N. S. 908; *Morgan's Ch. Acts and Orders*, 380, 386.

*Mr. Hodgins*, contra, contended that the replication was gone when the leave was given to file a supplemental answer, but it was retained for the benefit of the plaintiff, who could revive it. That the Deputy Registrar may grant one order to amend before replication filed. Here the order was at most an irregularity. *Davis v. Franklin*, 2 Beav. 369. The defendant comes too late; the order was served 4th February; the demand of office copy of amended bill was made on the 8th February, and on the 16th February service of the copy of the amended bill was accepted. *Macnamara*, 18. Notice of motion was given on the 25th of February to rescind the order to amend and to take the amended bill off the files—or for further time to answer—defendant ought to have applied to discharge the order to amend within fourteen days. The defendants had till the 23rd February to answer; they allowed this time to elapse, and did not move till afterwards.

*Mr. Crooks* in reply—The replication was undoubtedly standing on the files, and this shut out the jurisdiction of the Deputy Registrar, *Taylor* p. 62. The order to amend is void, and therefore time is of no consequence.

THE CHANCELLOR.—But for the provision in the order allowing the supplemental answer, that the same was to be filed without prejudice to the replication, the latter it is admitted would have fallen, and a new replication would have been necessary. The provision was therefore for the benefit of the plaintiff. I think I must hold both parties as having considered that this was reasonable; the plaintiff amended his bill, and the defendant demanded an office copy of it, and put the plaintiff to the expense of preparing and serving it. Nothing stood in the way of the plaintiff's right to obtain the ordinary order to amend but the preservation of the replication and this if a formal difficulty could at once have been removed. But it seems to me that both parties concurred in not treating it as in the way, and that it is too

late now for the defendants to object to the order to amend. The defendants might have examined the record or obtained an office copy at their own expense if they pleased, as they might at once have moved to discharge the order to amend. But this was not done, the order is treated as regular, and the plaintiff not only allowed to go to extra expense, but required by the defendant to go to it on the demand of an office copy. I refuse to discharge the Secretary's order, but I will vary it by giving the defendant leave to answer the amendments within one week on payment of costs of this and the former motion before the Secretary, and they undertaking to accept four days notice of examination and hearing for the next Guelph sittings.

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LEE v. BELL.

January 17, 1866.

*Judgment creditors—Stop orders.*

This Court has no jurisdiction to grant "a stop order" at the instance of a judgment creditor of a party entitled to funds in Court.

Smith, a judgment creditor at law of the defendants, W. H. and C. T. Bell, presented a petition under the circumstances and for the purposes set forth in the judgment.

*Mr. G. Murray*, in support of the petition, cited *Wellesley v. Mornington*, 11 W. R. 17, *Re Blunt's Trust*, 10 W. R. 379; Imp. Act, 1 and 2 Vic., chap. 110, secs. 14 and 15; *Robinson v. Wood*, 5 Beav. 388; *Watts v. Jefferyes*, 3 McN. & G. 372 & 422; Morgan's Chan. Acts and Orders, foot note page 489, 3rd ed., 1862; *Feistell v. King's College*, 11 Beav. 254 Con. Stat. U. C., cap. 12, sec. 26, sub-sec. 10.

*Mr. Moss*, *contra*, contended that this Court could not make the order by virtue, either of its inherent or statutory jurisdiction. No statute conferring rights similar to those conferred on judgment creditors by the Imperial Act 1 & 2

Vic. 110 has been passed in Upper Canada, and that statute itself is not in force here.

**THE SECRETARY.**—In this suit a decree was made in May, 1865, which ordered the payment into Court of certain moneys. The defendants, W. H. and C. T. Bell, are entitled to a share of these moneys when paid in. S. B. Smith, who has recovered a judgment at law against these defendants, and who has in the Sheriff's hands a writ of execution, founded on that judgment, now presents a petition praying that an order may be made declaring his judgment a first charge and lien upon the interests of the defendants, in their late father's estate under his will, and upon such part of the estate or the proceeds thereof, as are now or hereafter may be paid into Court, preventing the payment out of Court to these defendants of any part of the moneys now in Court or hereafter paid in until his debt and costs be fully paid, and that the petitioner may have notice of any future proceedings in the cause, and be entitled to attend the same. In other words he seeks to obtain what is commonly called a stop order. On the part of the defendants it is contended that the Court has no jurisdiction to grant such an order on the application of a judgment creditor. This contention is, I think, correct. At common law the right of a judgment creditor was to take the body of the debtor in execution, or to issue a writ under which the Sheriff could seize and sell his goods and chattels, and in due course he was entitled in England to a writ of elegend, or in this Province to a writ under which his lands might be sold.

By the Imperial Act, 1 & 2 Vic., ch. 110, arrest on mesne process was abolished, and the creditor thus being deprived of a remedy he had long enjoyed, the rights of judgment creditors were extended, judgments were made a charge on lands, and by sec. 14 it is provided that if any person against whom any judgment has been entered up in any of Her Majesty's Superior Courts, &c., shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not),

standing in his name in his own right, or in the names of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. Doubts having been entertained as to whether this section extended to money in the hands of the Accountant General of the Court of Chancery, the 3rd & 4th Vic., ch. 82, was passed declaring moneys in the hands of the Accountant General subject to the charging order provided by 1 and 2 Vic., ch. 110, sec. 14. Under the general words of the Chancery Act, Con. Stat. U. C., ch. 12, sec. 26, as interpreted by this Court in *Re Lahn*, these acts may be in force here so far as they affect the Court of Chancery, but if they are, they give judgment creditors rights without the means of enforcing them. A stop order is never granted in England on the application of a judgment creditor except in aid of a charging order obtained at law. *Hulkes v. Day*, 10 Sim. 41; *Watts v. Jefferyes*, 3 M. & G., 372, and see *Warburton v. Hill*; *Stent v. Wickens*, Kay, 470. And it is granted there because by force of the statute the judgment creditor, who has obtained the charging order, stands in the same position as if he had an assignment of the fund. The charging order can be issued by a Common Law Judge only, and not by a Judge of the Court of Chancery. *Miles v. Presland*, 2 Beav. 300. And as these statutes, even if in force, as to the Court of Chancery here, are certainly not in force as to the Courts of Common Law, it follows that no judgment creditor can here obtain the charging order necessary to be obtained before a stop order can be granted, there being no act in force here which gives the Courts of Common Law power to issue such an order.

All the cases cited, except *Robinson v. Wood*, 5 Beav., 388,

where stop orders have issued on the application of judgment creditors, are cases where the charging order at law had first been obtained. In *Robinson v. Wood* the application was not for a stop order, but money having been directed to be paid out to the judgment debtor, and cheques for the purpose actually drawn, the Court was asked to stay the issuing of these cheques to the debtor, and for an order that they might be handed over to the Sheriff of Middlesex. The first part of the motion was granted, and the issuing of the cheques stayed, but the other part of it was left for further argument. Taking the view I do, the petition of Mr. Smith must be dismissed with costs.

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#### PURKISS v. MORRISON.

This was an application similar to that in the preceding case of *Lee v. Bell*.

THE SECRETARY.—The only difference in this case is that the judgment creditor has obtained an order garnishing debts due to the judgment debtor. This, however, places him in no better position as to the present application. The charging order necessary to be obtained before a stop order, can be granted, and the garnishing order being two entirely distinct things.

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#### BANK OF MONTREAL v. WILSON.

February 9, 1867.

*Appealing from Secretary's order—Practice—Reinstating bill—Solicitor.*

A party cannot use affidavits not used before the Secretary, or make a new case on an appeal. Nor will the Court entertain a motion to reinstate a bill based on grounds which might have been shewn in resisting a motion to dismiss.

A Solicitor should not treat with a party to a cause in the absence of the Solicitor of such party.

*Mr. J. A. Boyd, moved before the Chancellor, by way of*

appeal from the Secretary, who had granted an order dismissing the plaintiff's bill, and proposed to read an affidavit made since the former motion.

*Mr. T. Ferguson*, for the defendant, suggested that the affidavit containing new matter could not now be read, as it did not show that the evidence could not have been given on the original motion.

THE CHANCELLOR refused leave to read the affidavit.

*Mr. J. A. Boyd* then argued the matter on the merits as the facts appeared before the Secretary, contending that there was evidence that a settlement had been pending, which accounted for delay, and that the Secretary should have refused the motion to dismiss.

THE CHANCELLOR.—I refuse this motion, with costs, on two grounds:—

1. That the order of the Secretary was, I think, right, and the new material now brought forward should and might have been used in resisting the motion to dismiss. It is now sought to use it for the purpose of reinstating the Bill, and it seems to be considered that this may be done as of course. No such practice can be allowed. The result would be that a plaintiff might use as little material as he chose, running the risk of it being sufficient, or no material in answer to a motion to dismiss, and then come forward with a fresh case, existing at the time of the previous motion, and ask upon it to have the order to dismiss discharged and the bill reinstated. No such course of practice or proceeding is permitted in any Court.

2. If the material now brought forward for the first time could be presented on this motion, I would decline to act upon it, because it consists of letters written to, and interviews with, offers made to and statements by way of admissions extracted from defendant during the progress of the suit and in the absence of his Solicitor. I think the conduct of the plaintiff's Solicitor most reprehensible in making any offer to or receiving any statement from defendant in the absence of his Solicitor; and his attempt at inducing him to

make a settlement of a disputed and opposed claim was highly improper. A Solicitor who had proper respect for himself or his profession would not hold any communication of the kind that passed here, except with the Solicitor of the opposite party, and even had the defendant come to the office of plaintiff's Solicitor, as the latter alleges, of his own accord, he should have refused to negotiate with him personally. I think it clear, however, that his interview was at the solicitation of the plaintiff's Solicitor.

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#### BROTHERS V. LLOYD.

Saturday, 9th February, 1867.

*Opening foreclosure.*

The Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches, and shews no efforts made on his part to avoid foreclosure or save his estate.

*Mr. Hodgins* moved before the Chancellor in Chambers by way of appeal from the decision of the Secretary, who had refused to make an order setting aside the final order and opening the foreclosure. The defendant's affidavit stated the property to be worth a much larger sum than the plaintiff's claim and costs; that the defendant did not understand Chancery proceedings and supposed that if he did not defend the property would be sold and he would receive any excess. The bill had been filed as long ago as March, 1865, and the first step taken by the defendant to set aside the final order was taken on the 28th of November, 1866, the final order bearing date the 22nd August, 1866.

*Mr. Tilt*, for the plaintiff, read an affidavit stating that the property was not worth more than the plaintiff's claim; and that plaintiff had offered to let defendant's creditors have it on payment of his claim and costs.

A further affidavit on part of defendant, not used on the

motion before the Secretary was offered to be put in, but it was considered that such affidavit ought to have formed part of the original case made before the Secretary, and could only be put in now by consent, it not setting up any newly discovered fact or showing why the facts therein stated could not have been set up before. *Knapp v. Cameron*, 6 Grant 559; *Platt v. Ashbridge*, 12 Grant 105; *Waddell v. McColl*, Cooper's C. & P. R. 69, were referred to.

**THE CHANCELLOR.**—In this case there has been the most supine neglect on the part of the mortgagor. Nothing was done by him for nearly a twelve-month after bill served on him, although he himself shows that he was so far aware of the nature of the proceedings taken against him in Chancery, that he thought his estate would be sold by virtue of them. Yet, though he was in this peril, he lies by, does nothing, nay, treats the plaintiff as entitled to the premises, offers to permit Bell, to whom plaintiff has given a lease, to do the fall ploughing on the farm, and in no way bestirs himself to rescue his property or pay the plaintiff his debt till more than three months after the final order has been obtained. Indeed he has not to this moment made any effort to procure the money. I think, in a case so utterly bald as this, the Court should not interfere. If it does not, it at once declares that a mortgagor need not in any case, till after the lapse of three months from the time of final order, make the slightest effort to save his estate or pay the plaintiff. All proceedings would, under such a practice be illusory. The motion must be refused with costs.

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## HARRIS V. MEYERS.

March, 1867.

*Sequestration.*

Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn, but where the tenant having been notified by the sequestrator promised to pay him the rent in future, and afterwards on being indemnified paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator.

*Mr. Hodgins*, on part of plaintiff, moved that certain rents payable by a tenant of defendant may be paid to plaintiff, or to the Sheriff for him, acting under a writ of sequestration.

*Mr. S. H. Blake* for the tenant Cochrane, and Rose the assignee.

*Mr. English* for defendant.

In support of the motion, a leave from Myers to Cochrane, dated 4th July, 1864, for four years, also an assignment of such lease by the lessor to one Rose, dated 26th December, 1866, were put in. It appeared from the affidavit, that in July, 1866, Cochrane paid the Sheriff, under the writ of sequestration, such rents as was then due, and stated that he would pay the future rents to him as sequestrator. A bond of indemnity from Rose to Cochrane, dated 2nd January, 1867, was also put in; such bond referred to the writ of sequestration and indemnified Cochrane against it, *McDonell v. McDonell*, 10 U. C. L. J. 48, and *Jackson v. Jackson*, 10 U. C. L. J. 79, were referred to, and it was contended that the defendants promise in July to pay the future rent to the Sheriff as sequestrator was binding and rendered unnecessary an order to attorn.

*Mr. Blake, contra*, argued that the writ of sequestration, with a return annexed, should be in Court; that there was no evidence of any claim being due to the plaintiff; that the sequestrator had not seized the rent, or done one act equivalent to such seizure; that the assignments to Rose was *bond fide*, and could not be invalidated by the lessee, and

further contended that the plaintiff should have obtained an order to attorn as in *Wilson v. Medcalf* (1 Beav. 263); (2 Daniel 1259 to 1268), the writ should be returned with the names of the tenants on it, and then an order to attorn obtained. Tenants could not, he contended; have paid over the rent without the assent of the defendant.

*Mr. Hodgins*, in reply, referred to Woodfall's L. & T. 377, 208, and argued that if the tenant Cochrane had paid the rent to the Sheriff as promised, he would have been protected.

THE CHANCELLOR—A writ of sequestration having issued in this cause against the defendant's lands, the Sheriff, being sequestrator, served notice upon Cochrane as tenant of the defendant, and also gave him a copy of the writ. Upon the 2nd July following, Cochrane paid the sequestrator \$58.25, parcel of the rent due upon the 1st July, the balance having been paid to one Charles Francis, the attorney of one Rose, as assignee of it. Francis, as attorney of Rose, stated that the amount thus paid by Cochrane to him as such attorney, was in full settlement of all claims of the said Rose to the rent to become due from Cochrane, as tenant of Meyers; Cochrane then, in presence of Francis, stated that he would in future pay the rent to the Sheriff. On the 3rd day of January following, by appointment, the Sheriff's officer met Cochrane and demanded the rent for the half year due on the 1st January. Cochrane then refused to pay the rent, as it was again demanded from him by Rose; and Rose having indemnified him, he subsequently, and on the same day, paid the rent to Rose. It seems that upon the 26th December preceding, Meyers had assigned the lease of Cochrane to Rose, to secure him the payment of an advance of \$300, the amount of the rent due on the 1st January, and made by Rose to Meyers on the same 26th December. Before Rose had so made this advance, he took from Meyers an indemnity against any claim under the writ, and before Cochrane paid the rent to Rose, he took also from Rose an indemnity against the writ, and he and Rose both admit that they look to these respective indemnities. It is said

that there was no attornment by Cochrane to the sequestrator, and that the latter should have obtained an order upon Cochrane to attorn, and thus afforded him protection. No doubt this would be so if nothing had passed between the Sheriff and Cochrane ; but when Cochrane on the 2nd July, promised the Sheriff for the future to pay him the rent, and when Rose, through his Attorney, knew this, and through this same Attorney subsequently obtained indemnity from Meyers, and payment of the rent from Cochrane, and when, without any sufficient notice to the Sheriff to enable him to apply to this Court for an order upon Cochrane to pay, and without himself seeing, after his promise to the Sheriff, that such protection was afforded to him, Cochrane chose to pay the rent to Rose, trusting to indemnity from him and not to any order from the Court, he cannot now, I think, be heard to say that the sequestrator or the plaintiff should have obtained such an order, and that without it he was justified in paying to Rose. I think he must pay the rent over again to the sequestrator ; and I also think that Rose having taken the rent with a knowledge of these facts, and being himself indemnified, may also be ordered to pay it, though if the plaintiff is satisfied with the tenant's security, it may avoid a question if the order be confined to the latter alone, who must also pay the costs of this motion. It does not appear that the defendant knew of the tenant's promise to pay the Sheriff, nor that the Sheriff had sequestered the rents. Rent to accrue due is not a chose in action, and a tenant in respect of it may attorn, but what amounts to an attornment it is not easy to decide. See *Fenner v. Duplock* 2 Bing 108 ; *Cornish v. Serall*, B. & C. 471 ; *Hall v. Butler*, 10 A. & E. 204 ; *Angel v. Smith*, 9 Vesey 335 ; *Coulston v. Gardiner*, 3 Swanst, 279 N. A.; *Evans v. Matthias*, 7 Ell. & B. 590. Here, however, though the sequestrator might have acquired no right to distrain, the tenant disarmed him and the plaintiff by promising to pay him the rent, and for the time at all events waived any right to an order for protection. In *Wilson v. Medcalf*, 1 Beav. 263 ; the Master of the Rolls said that if Mrs. Brown, who owed the rent charge payable to the

defendant, and past due, had been indemnified, he would have ordered her to pay. I think I may make this order without the writ being in Court. A copy of it is here with the Sheriff's return and affidavit. In *Goldsmith v. Goldsmith*, 11 Jurist 564, it was said that the Court could not make an order on the tenants to attorn unless the writ and return were in court.

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McLAREN v. COOMBS.

February 16, 1867.

*Taxation—Costs.*

Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do.  
In such a case where they had appeared and contested, the guardian was allowed only an attending fee without brief.

An appeal from the Secretary's taxation and an appeal from the Master's report took place.

McKeown, the guardian of the infants, had obtained from the Master's office a copy of the evidence taken, which being very long, cost \$30. It was alleged that this was obtained before the appeal, not for counsel's use then, and unnecessarily. On the other hand it was alleged that the guardian properly obtained this copy of depositions for reference at the appeal, as the infants were interested beneficially in the results as residuary legatees of Mrs. Templeton. The executors of this lady were parties to the appeal in the same interest as the infants. It was argued that on this account the guardian did not require a brief of the evidence, but should have relied on the case made by the executor's counsel.

*Mr. Downey*, for appellant.

*Mr. Curran*, contra.

**THE CHANCELLOR.**—On the appeal of the executors, I think the infants were not entitled to appear. It is true it was for their benefit if the executors succeeded, but they have

not appealed, and should therefore have left the executors to contest the matter. The attention of the Court was not called to this when costs were directed to all parties. The executors, I believe, failed in their appeal or on the main point of it. All that can be done now is to give to the infant's guardian the smallest possible amount for such costs, and this will be an ordinary attending fee without brief. In this respect the taxation must be reviewed. This view was not urged before the Secretary, nor indeed before me; but it seems to me that the question now raised must be disposed of by it. No costs to either party.

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#### McDONALD v. GORDON.

March 11, 1867.

*Opening biddings—Conditions of sale.*

Where the title or the proof of it is involved in no difficulty a condition of sale that "The vendor is not to be bound to give any evidence of title or any title-deeds or copies thereof, other than such as are in his possession, or procure any abstract," was held to be very objectionable, and should not be sanctioned by Masters even by consent.

The principle upon which sales under decrees of Court should be conducted, considered and commented on.

*Mr. Blain* moved in Chambers, before V. C. Mowat, to open the biddings, on grounds which fully appear in the judgment.

*Mr. Howard*, contra.

MOWAT, V. C.—One of the conditions of the sale was that "The vendor is not to be bound to give any evidence of title or title-deeds, or copies thereof, other than such as are in his possession, or prove any abstract." It is not pretended that there was any reason for this condition, and a more objectionable condition, or one in more manifest violation of the course of the Court (Sugden V. & P., 94, 97, 100, 14th Ed.; Dart., 45, 109 et seq.; Bennett's Master's Office, P. 162; 1 Smith's Practice, 903, 904, 996 to 998, 7th Ed.), it would have been difficult to prepare. It ought to be distinctly understood in regard to sales by this Court,

that if a good title can be made, the parties are not at liberty to relieve themselves by special conditions from the obligation to make such a title, and that the Court will not provide by conditions for imaginary defects. *Piers v. Piers*, Sausse & Scully, 414. If, on the other hand, the title is bad, "it is the uniform practice of a Court of Equity not to set up for sale a title knowing it to be bad;" *Bennett v. Wheeler*, 1 Ir. Eq., 19; *Lahey v. Bell*, 6 Ir. Eq., 122; Sug. V. & P., 14 Ed. P. 100. Courts of Equity holding that, in such a case, "it would be almost a fraud for a vendor to bring a title to market with a condition that a purchaser must accept it." *Hume v. Bentley*, 5 DeG. & Sm., 527.

Every instance of a violation of these principles tends to weaken that confidence in Chancery sales, the advantages of which to the parties concerned is matter of almost daily experience. No auction sales, as a general rule, yield better prices than those which take place under the authority of the Court, and applications for an order of sale have several times been made before me on the express ground that such sales yield more than an auction sale out of Court, not to speak of a sale by the Sheriff under execution. The principal reason is that bidders at a Chancery Sale know what they are buying, and are aware that the property will not be forced upon them unless the title is as represented in the advertisements, and that, if it is not, the purchaser will be discharged from his purchase and paid the costs he has incurred. Whenever there really is a defect in the evidence of title, which cannot with reasonable diligence be supplied, and the Master is satisfied of this, the condition should distinctly provide for the case, and should not be more deprecatory or burdensome than the occasion calls for. If these special conditions are overlooked by purchasers and do not materially prejudice the sale, to count on this would be to sell or betray the confidence which the general character of our sales has created in the minds of bidders. Sales by the Court, and sales out of Court by persons occupying a fiduciary character, ought to be conducted as a prudent, well-advised and honest owner, anxious to get the most for his

own property would conduct the sale of it. This is a plain and easily understood rule, and one which there is seldom any difficulty in acting upon. It is in fact but an application of the maxim which requires every one to do as he would be done by. And when does a private owner whose title is good, advertise a sale of land by auction with a thrice repeated stipulation in every advertisement that no one who buys is to call on the seller for any evidence of his title to the property? To find an owner so acting, one would have to visit a lunatic asylum.

But it is not every depreciatory condition that will authorize the setting aside of a sale after it has taken place. In the present case, the application is made jointly by the defendant Gordon, who is a trustee for the mortgagor's creditors (such creditors not being themselves parties to the suit,) and by a third person who offers \$4,000, some 20 per cent. more than the price obtained at the sale (\$3,350), and the application is made before the confirmation of the Master's report on the sale. By the old practice this advance would, of itself, have been a sufficient ground for opening the biddings, and a resale would have been ordered, the former purchaser being repaid all his costs, charges and expenses; though after the confirmation of the report special grounds were necessary. But by the 21st order of December 20, 1865, it was provided that biddings should only be opened thenceforward upon special grounds, whether the application is made before or after the report stands confirmed.

Here, having reference to the very objectionable condition of sale on which the sale proceeded, in connection with the fiduciary character of the party to the suit who united in this application, the amount of the advance offered, the promptitude with which the present application has been made, and the circumstance of the nominal purchaser having made the purchase as agent of a party to the suit, I think sufficient special circumstances are shown to make out a case for opening the biddings within the meaning of the general order.

The order will be on the usual terms as respects the par-

ties moving and the purchaser. See form 2 Seton 1203, 3rd ed. The plaintiff's costs of the application will be costs in the cause; for the sale having been allowed by the other parties to proceed on this very objectionable condition, I do not think I ought now to deprive the plaintiff, a mortgagee, of his costs. It was the duty of the assignee to object to the condition at an earlier date, though, in view of the general interests of suitors, unnecessary conditions of this kind should not be sanctioned by the Masters of the Court, even with the consent of the parties.

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**ARMSTRONG v. CAYLEY.**

March 18, 1867.

*Arbitrator—Submission.*

Where a submission was made to an arbitrator "to determine which of the said several items of claim the estate of Mrs. B. is bound as matter of law to pay." Held, that this confined the authority to deciding the question of legal liability, and did not authorize arbitrator to find sums payable.

When under such a submission the arbitrator gave interest, it was held that he was authorized to consider the liability for interest although he could not correctly find the amount due.

The parties had made the following submission:—"The late Sarah Anne Boulton, by deed containing full covenants for title, conveyed to Arthur Armstrong twenty-five acres of land, which she claimed under Sheriff's sale for taxes. Purchase money £50. Armstrong paid £10 cash, and gave a mortgage for £40, with six per cent interest, interest from 19th December, 1860. Mrs. Boulton died, leaving a will by which Hon. Wm. Cayley, W. H. Boulton, and M. C. Cameron, were appointed executors. They sued Armstrong on the covenant in his mortgage. He filed a bill to restrain the suit, alleging that the title given him was defective. His bill was dismissed with costs. Afterwards, he paid the mortgage money with the costs of suit brought thereon, but before doing so applied to the executors, who are also trus-

tees under the will of Mrs. Boulton, to allow him to use their names in an ejectment to recover the land from the party in possession, one Foster. They allowed their names to be used, taking a bond of indemnity from Armstrong to protect them against costs. The giving of the bond is denied by Armstrong, and the referee may receive evidence as to the fact of giving the same; and the circumstances attending the giving of the same, if given. The ejectment suit failed on the ground that there was no sufficient description of the land in the Sheriff's deed, which was therefore held void. Armstrong now claims under his covenants from the estate damages for the breach in respect to title. He never went into possession; and he claims under the following heads:—

1st. £10 paid down, and interest thereon at 6 per cent. to date.

2nd. Balance of purchase money and interest.

3rd. The payment of the balance was by notes, which were discounted at a reduction of ten per cent. He claims the ten per cent.

4th. Costs paid and still due Fitzgerald, his Chancery costs on his abortive Chancery proceedings, and interest thereon.

5th. Armstrong's attorney's costs of such Chancery proceedings.

6th. Costs of suit and defence to action in his covenant on mortgage.

7th. Costs of ejectment. Suit brought by executors above mentioned.

It is agreed between the said Armstrong and the said executors that the Honourable Samuel Bealy Harrison, of the City of Toronto, Judge of the County Court, shall determine which of the said several items of claim the estate of Mrs. Boulton is bound as matter of law to pay. Costs of reference, arbitration and award to be in discretion of referee."

The arbitrator made his award as follows:—"I do award, order and determine of and concerning the several items of claim by the above named Arthur Armstrong against the

estate of the late Mrs. Boulton, deceased, that the above named William Cayley, W. H. Boulton, and M. C. Cameron, representing the estate of the said deceased, are bound to pay to the said Arthur Armstrong, the following sums:—First, the purchase money and interest thereon on the lot of land above mentioned, amounting, as I compute it, to \$274; second, the costs on both sides of the Chancery suit to try the title of the said lands, amounting, with interest on part thereof paid, to \$125 50; and third, the costs of the ejectment suit brought in the names of the said W. Cayley, W. H. Boulton, and M. C. Cameron, notwithstanding the bonds of indemnity produced in evidence before me, amounting to the sum of \$160 50, in all amounting to the sum of \$560. And I find that the sum of \$50 has already been received by the said Arthur Armstrong, which leaves a balance of \$510 for which the estate of the said Mr. Boulton is liable. I do therefore order, award, and determine, and direct that the said W. Cayley, W. H. Boulton, and M. C. Cameron do, within fourteen days, pay to the said Arthur Armstrong the said sum of \$150 together with my fee for this award; and I do order and direct that upon receiving these amounts, the said Arthur Armstrong do, at the expense of the said W. Cayley, W. H. Boulton, and M. C. Cameron, execute a release to them if so required to do, and I award that each party shall pay his own costs of the reference to me."

*Mr. W. H. Burns* moved on notice, that the sum of five hundred and twenty dollars, being the sum awarded to him, and costs, be ordered to be paid to the said Arthur Armstrong, or in default that execution do issue. He referred to Davies & Price: 10 W. R. 864, S. C. 6. L. Times, N. S. Q. B., 713, and other authorities.

*Mr. A. Hoskin* opposed the motion, and argued that the arbitrator should only have found whether, as matter of law merely, the executors were bound to pay the claims made by Armstrong, and that there was no submission to him to

fix or assess the amount of the several claims, and that he had no power to do so, and that the award was bad.

MOWAT, V. C.—In this case the submission, after stating certain facts, and that Armstrong claimed certain items which are specified, sets out the agreement to refer in these words :—“ It is agreed between the said Armstrong and the said executors that the Hon. S. B. Harrison, of the City of Toronto, Judge of the County Court, shall determine which of the said several items of claim the estate of Mrs. Boulton is bound, as matter of law, to pay.” I think this confines the authority of the arbitrator to deciding the question of legal liability, and did not authorize him to find the sums payable in respect of the several items or to order payment of them. But his finding on the question of liability is good, and the rest may be rejected as surplusage.

I think the proper order will be to refer it to the Master to tax the costs which the arbitrator finds the respondents should pay, *Bhear v. Harradine* (7 Ex. 269), *Holdsworth v. Barsham* (2 B. & S. 480), and to direct the respondents to pay the same, with the purchase money, \$200, named in the submission, and the interest thereon from the 19th December, 1860. Decrees in this Court are often drawn in that form as to interest, differing in that respect from judgments at-law. Doe dem. *Moody v. Squire*, (2 Dowl. N. S. 327.) On this order, in case of default after due service, execution will issue as in other cases ; Con. Stat. U. C., ch. 24, secs. 15 & 19. *Russell on Awards*, ch. 7, sec. 1, p. 589, and cases there collected. *Baker v. Cotterill*, (7 Dowl. and L. 20.) *Bower v. Bower*, (8 Jur. N. S. 198.)

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## GIBB v. MURPHY.

6th April, 1867.

*Appeal from the Secretary's decision.*

Before an appeal will lie from the Secretary's decision, the order thereon must be drawn up and entered.

An application had been made by the defendant before the Secretary for an order to dismiss the plaintiff's bill for delay in prosecution. The Secretary made an order imposing certain terms on the plaintiff. From this the defendant now appealed.

*Mr. Hector Cameron* for the defendant.

*Mr. Hamilton* objected that the order made by the Secretary had not been issued, and that the appeal could not till then be heard.

THE CHANCELLOR.—The order made an application to the Judge's Secretary, comes within the ordinary practice of Orders of the Court, and must be signed and entered before an appeal can be brought. Application dismissed with costs.

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## KELLEY v. MACKLEM.

April, 1867.

*Dismissing bill when one defendant died.*

One of the surviving defendants may properly move to dismiss, though suit has become abated by the death of another defendant.

Appeal from the order of the Secretary, dismissing bill.

*Bank of Upper Canada v. Nichol*, (1 Cham. Rep. 294); *Williams v. Page*, 24 Beav. 490, were cited.

THE CHANCELLOR.—The plaintiff may have been misled herein by the case of *Bank of Upper Canada v. Nichol*, which seems to have proceeded in a decision alleged to have

been made by me in *Harrison v. Ferguson*. I can find no trace of such a decision, and I have no recollection of it and it would be opposed to what I consider, and I suppose I must always have considered, the practice of the Court, viz., that one defendant may move to dismiss the bill though one of the defendants has died, and the suit as to his interest in it has become abated. If a plaintiff dies, then the defendant must take some steps to have suit revived before he can get rid of it. I understand that the *Bank of Upper Canada v. Nichol*, is not considered as now governing the practice of the Court—but as the plaintiff may have been misled by it, and may have expected through a motion calling upon him to revive to learn whom the defendant had appointed as her Solicitor in the place of her former Solicitor, made a County Judge, and as in consequence of the difficulties he met with in the conduct of the suit, he was allowed to take the case down to the last sittings at Sarnia, but could not get down there in time, I will reinstate the cause on payment of costs of the former motion—plaintiff undertaking to go down to some sittings of the Spring Circuit, and to pay any extra costs of taking the cause there instead of at the sittings at Sarnia.

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#### MoNAB v. MORRISON.

##### *Dismissing bill—Costs.*

*Mr. Robert Sullivan* applied to dismiss the plaintiff's bill on the ground that the defendant Andrew Laurie had satisfied the plaintiff's claim by purchasing the judgment on which the bill was filed.

*Mr. Thomas Moss*, on behalf of the plaintiff's Solicitor, resisted the claim on the ground that by the terms of an agreement made between him and the defendant Laurie, certain costs were due to the former, and ought to be paid before the Court should grant the relief prayed; and the

plaintiff's Solicitor claimed to be paid such costs, and also the costs of the application.

V. C. MOWAT granted the order, dismissing the plaintiff's bill as against the defendant Laurie, on the ground that the plaintiff's costs had been provided for by the same instrument which contained the assignment of the plaintiff's claim to the defendant Laurie ; and that the claim of the plaintiff's Solicitor for them was in this Court cut out by this instrument.

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#### GREEN v. ADAMS.

April, 1867.

*Mortgagor and mortgagee—Paying off mortgage.*

A mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due, and a bill to foreclose which has been filed.

A bill for foreclosure had been filed and served, claiming foreclosure in default of payment of an instalment of interest, and not claiming payment of the whole of the mortgage money.

*Mr. Rae* applied on behalf of the defendant, who had paid in the whole of the mortgage money into Court, for an order dismissing the plaintiff's bill, and directing a discharge of the mortgage to be executed by the plaintiff.

*Mr. Robert Sullivan* resisted the application.

**THE SECRETARY.**—The question in dispute in the case is, whether on a bill being filed for foreclosure, on default in payment of an instalment of interest, the defendant can under order 32, sec. 5, pay into Court the whole amount secured by the mortgage for principal and interest with the costs, and compel the mortgagee to take it. The point was raised before the late V. C. Esten, in *Drummond v. Guickard*, on 25th February, 1864, and he then decided that the mortga-

gee could not be compelled to accept the whole amount, but only the interest in arrear and the costs. In that case the bill prayed payment of the whole amount, here it does not. As the mortgagee here refuses to accept the whole amount, I think I must follow *Drummond v. Guickard*, and refuse the present motion with costs.

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### GILL v. GAMBLE.

#### *Solicitor's lien.*

A Solicitor's lien on title deeds for his professional services attaches and continues although the property to which they relate has passed from the ownership of the client for whom the services were performed by sale and purchase under a power of sale contained in a mortgage. The purchaser takes the interest of the mortgagor subject to the lien.

In this case the facts are that Mr. Clarke Gamble had been for some years Solicitor for one Andrew Ward; that, while acting as such Solicitor, Ward effected a loan with one Gillespie, but not through the agency of Gamble; that Gillespie employed Mr. Gamble, as his Solicitor, to prepare a mortgage from Ward to secure the loan; that Gamble did prepare the mortgage and procure its execution, and, shortly after, he transmitted it, with an abstract of title taken from the books of the registry office, to Mr. Moffatt, in Montreal, as the agent in this country, of Gillespie, who was resident in England; and thereupon Gamble's employment by or for Gillespie ceased, and he never again appears to have acted in any way for Gillespie, who some years afterwards employed as his Solicitors Messrs. Crooks, Kingsmill & Cattanach, to sue upon the mortgage. In the course of the preparation of the mortgage Gamble received some, if not all the title deeds of the property from Ward. Ward was then indebted to Gamble as his Solicitor, and the indebtedness was subsequently increased. Gamble has retained these deeds ever since, and has never been called upon by

Gillespie for them, and he claims a lien on them for his professional services to Ward. Subsequently to the execution of the mortgage to Gillespie, Ward executed a further mortgage on the same property to one Austin, with a power of sale in case of default. Default having been made, Austin acted upon the power of sale, and the equity of redemption thus mortgaged to him was sold to the plaintiff Gill, who has since paid or arranged to pay Gillespie's mortgage, and now claimed to have the deeds of the property in the possession of Gamble delivered up to him by the latter, freed from any lien upon them as against Ward.

**THE CHANCELLOR.**—This, I think, he is not entitled to. At the time of the mortgage to Austin, Gamble held these deeds, and, subject to the rights of Gillespie as mortgagee, he had a lien upon them for his professional claim against Ward. Of course Gamble acted for Gillespie, and not having at the time reserved as against him such right of lien as he then had, he could not have withheld the title deeds from Gillespie; but Gillespie does not claim them, and he appears now by his counsel saying that he merely requires to be paid off, which the plaintiff Gill has done or made arrangements to do, as indeed he must or lose the estate. If he does not pay off Gillespie, and the latter should have to enforce his demand by sale or foreclosure, then indeed, to him or his assignee Gamble may be obliged to deliver up the deeds, but Gill now takes the place of Ward on the estate, as owner of the equity of redemption, which remained on the execution of the mortgage to Gillespie. He is to pay off Gillespie as Ward would have done, and as Ward could not have obtained these deeds from Gamble without satisfying his lien upon them, so neither can Gill, who claims under him. I think that Gamble is entitled to a lien for all services rendered as Solicitor to Ward up to the time of the execution of the mortgage to Austin, and I do not understand that anything more is asked for. Of these the plaintiff, paying the costs of suit, can have an account.

## WILSON v. BRUNSKILL.

Saturday, March 30, 1867.

*Production of documents—Privileged communications.*

In a case between vendor and purchaser, where a defendant who was called on to produce a certain letter which he refused to produce on the grounds "that the same is and contains an opinion from the said Magrath, who was then acting as my Counsel and Solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my Solicitor, relative to my said title." It was held to be a privileged communication, and a motion to commit for non-compliance with a notice to produce was refused with costs.

The executors of Widmer, deceased filed a bill against Thomas Brunskill and others, purchasers from Brunskill of building lots, portions of a block purchased by Brunskill from Widmer, to foreclose a mortgage given by Brunskill to secure the purchase money, dated 3rd December, 1856. To this bill defendant answered, setting up want of title in the vendor, and charging fraud and misrepresentation.

In the course of the cause the plaintiff served a notice to produce documents, and defendant in his affidavit no production referred to a letter in the schedule, showing documents in his possession which he objected to produce, in these terms :—"I object to produce the said letter because the same is a confidential communication between my former Solicitor and myself, relative to matters in which the said Magrath was then acting as my Solicitor."

Brunskill was cross-examined on his answer, 14th June, 1866, and in the depositions taken is the following passage :—"Mr. Hamilton asks—'Will you produce a letter from Mr. Magrath to you, dated 5th December, 1866?' Mr. Brunskill says—'I will not produce it, as it is a confidential letter between my Solicitor and myself.' This letter refers to Mr. Small's claim. Mr. Hamilton asks—'Did this letter refer to Dr. Widmer's being a director of the Bank of Upper Canada?' Mr. Brunskill answers—'I refuse to state anything about this letter, as I consider it a privileged communication.'"

In December, 1866, a motion was made in Chambers before the Judge's Secretary, for an order to commit Bruns-kill for contempt in refusing to produce the letter above referred to on two grounds :—First, that the excusing words in the affidavit (quoted above), were not sufficient to satisfy the practice, as they did not state whether the letter related to the title in question, or to matters before or after legal proceedings were instituted or not ; and second, because the letter being *from* the attorney to the client was not a privileged communication, *McDonald v. Putnam*, 11 Grant 258, and cases in 13 Jurist, N. S. 973, and 1 Sim. N. S. 3, were referred to.

THE SECRETARY refused this application with costs, on the grounds that the letter related to defendant's title.

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GREEN v. AMEY.

May 10, 1862.

*Production of documents.*

When a party admits documents in his possession he is *prima facie* bound to produce them, or assign a sufficient reason why he should not. But where a party refers in his bill to documents which otherwise he would not be liable to produce ; he does not by so doing create a liability to produce them.

*Mr. Strong, Q. C., for appellant.*

*Mr. Fitzgerald for respondent.*

ESTEN, V. C.—This is an appeal from an order made by me in Chambers, directing the plaintiffs to produce a certain memorandum of agreement and conveyance mentioned in the bill under which they claim title to the property in question ; and that they should be at liberty to make a further affidavit as to any other documents in their custody or power, relating to the matters in question in the cause. The common order for production of papers had been made at the instance of the defendants. The plaintiffs did not

produce any documents in compliance with the order, but made an affidavit in which they admitted that they had documents in their possession or power relating to the matters in question in the cause, but gave no description of them, and objected to produce them on the ground "that they related exclusively to their own title and case, and were irrelevant to defendants' defence." The defendants applied upon notice for an order for the production of the memorandum of agreement, and the deed mentioned in the bill or for such order as the Court should deem just with regard to the other documents, and thereupon the order in question was pronounced. So far as regards the other documents the order has been acquiesced in, as a further affidavit has been made; but so far as it directs the production of the memorandum and deed, it is objected to and forms the subject of the present appeal. We think the order, so far as it is appealed from erroneous. It was founded on the supposition that the plaintiffs had set out the documents in question in his bill, and therefore was bound to produce them as was supposed to be warranted by the cases of *Taylor v. Heming*, 5 Jur. 766; *Hunt v. Elmes*, 5 Jur., N.S. 645; *Neate v. Latimer*, 2 Y. & C. 257; which last case appears to have been misunderstood as explained in a subsequent case of *Glover v. Hall*, 2 Phill. 484, and is no authority for the proposition which it was considered to support. I may remark that this case was not cited in the arguments before me, but was referred to by me in considering the case afterwards. We do not think that the cases of *Taylor v. Heming*, and *Hunt v. Elmes*, establish any rule which would sustain the present order. Indeed the case of *Hunt v. Elmes* was founded entirely upon the supposed effect of *Neate v. Latimer*, and it is singular, that although it was decided many years after *Glover v. Hall*, the case was not referred to either in the argument or the judgment. It may be that a party gratuitously setting out a document in the pleadings is bound to produce it in order that it may be ascertained that it is correctly set out. There is some reason in this, as the other party will assume it to be correctly stated and may act upon it. The case of

*Taylor v. Heming* seems to countenance such a proposition. But a party must of necessity to a certain extent set out the instruments which constitute his title, and he cannot by doing so create an obligation to produce them when he would not otherwise be bound to produce them. In the present instance the documents in question relate exclusively to the plaintiff's title; in fact constitute it and do not in any way affect the defendant's title, except by destroying it, if they were operative and valid; if they were as infirm and invalid as possible they could not in any way support the defendant's case. I was of this opinion on the motion, and only ordered the production on the authority of the cases which were cited, and of the case of *Neate v. Latimer*. We think these cases insufficient to warrant the order so far as it is appealed from, and that to that extent it ought to be varied. Under these circumstances I should have made an order allowing a further affidavit, but refusing the production of the documents in question, and the order would have been made without costs, and we think therefore that the costs ordered to be paid should be refunded. It may not be without its use to make some remarks upon the practice under the common order for production. A form of affidavit has been prescribed by the general order as one which would be satisfactory as we think in reference to this point, as the form of the common order for production, but where a party who has been ordered to produce documents admits that he has in his custody or power documents relating to the matters in question, he is *prima facie* bound to produce them, and he will be ordered to do so, unless he assign in his affidavit a sufficient reason why they should not be produced. In case the documents are produced and no affidavit is filed or an insufficient affidavit, or an affidavit not assigning a sufficient reason for not producing the documents in question the order has been disobeyed, and the proper course seems to be to move for the order *nisi* for an attachment or perhaps upon notice for the commitment of the party.

## McDONELL V. MCKAY.

April 1, 1867.

*Production of Documents—Form of Affidavit—Books of Account in actual use.*

Where books were in actual use by defendant, the Court refused to order him to make verified copies of entries relative to matters in question for use of plaintiff—but where it was sworn on the part of the plaintiff, and not denied by the defendant, that the latter had documents so relating, which were not mentioned in his affidavit, he was ordered to produce them.

Where a bank agent refused to produce on the ground that he had no documents in his possession but as such bank agent, it was held that he ought to set out in his affidavit what documents were so in his possession. And it appearing from his answer that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause.

The plaintiff in this cause had taken out and served the usual order to produce documents. One of the defendants admitted in his answer that he possessed some documents to which no reference was made in his affidavit on production, which admitted also the books of accounts containing entries relative to the matters in question, but which the defendant objected to produce, on the ground that they were in constant use in his business.

Another defendant objected to produce documents on the plea that he was only the agent of the parties who owned the documents, and who were not parties to the suit, and also that some of them were books in constant use.

*Mr. McGregor*, for the plaintiff, applied for an order that the defendants, McKay and Noel, do file proper and better affidavits on production of documents, with schedules specifying what books and papers are in their possession or power respectively in any way relating to the matter in dispute in this cause or for an order that the defendant, McKay, do produce before the Deputy Registrar, at Cornwall, copies verified upon oath of all entries in the books referred to in the first paragraph of his affidavit on production already filed, also the original agreement mentioned in the cause, and a letter written to the said defendant McKay by Donald McLennan, the plaintiff's Solicitor in the cause,

and bearing date, &c., and that defendant Noel do produce before the said Deputy Registrar copies certified upon oath of all entries in the books in his possession, and any correspondence in his possession in any way relating to the matters in dispute, and that the defendants, McKay and Noel, should pay the costs of such application.

*Mr. J. A. Boyd, contra.*

MOWAT, V. C.—The case of the plaintiff, so far as material to be stated for the present motion, appeared to be this. He was licensee of certain timber limits, and on the 22nd December, 1862, assigned them to Messrs. Jeffrey, Noad & Co., the assignment being in form absolute, but being declared by a contemporaneous writing to be for the purpose of securing certain advances, and that these advances were repaid on or before the 31st October, 1863, and from that date the plaintiff was beneficial owner, free from any charge in favour of Jeffrey, Noad & Co. The plaintiff procured the license to be renewed for the years 1863, 1864, and 1865, in the names of Jeffrey, Noad & Co., but for his own benefit. On the 18th February, 1865, Jeffrey, Noad & Co. assigned the limits to defendant, Hilaire Vavasour Noel. On the 26th April, 1866, the license was renewed to the defendant Noel for 1866. The bill states that the defendant, Wm. McKay, claims to have purchased the limits, and that the defendants Alexander Burnet and Wm. Bannerman, in conjunction with McKay, are cutting the timber and committing waste—acts against which the bill prays an injunction.

The defendant, McKay, by his answer claims to have purchased the limits from the Quebec Bank, in trust for whom Jeffrey, Noad & Co. have assigned the limits to Noel, and insists that their purchase is under the circumstances valid as against the plaintiff. Noel in his answer makes similar statements. The motion is as to the production of documents under the order to produce.

The defendant, McKay, by his affidavit on production, admits that he has in his possession "certain books of account," in reference to which he makes certain statements

which it was admitted in the argument were not sufficient to disentitle the plaintiff to an inspection. But he has set forth no list of them, and the affidavit, in this respect, is insufficient.

The defendant, McKay, says that the books relate to his business as a country merchant at his store in the village of Renfrew; that he is constantly using them there, and that it would be a great inconvenience to him to have them removed to Cornwall for the plaintiff's inspection. The plaintiff does not ask for their production before the Deputy Registrar at Cornwall, but insists that if not so produced, the defendant should furnish him with certified copies of all entries relating to the matters in question. I find no authority for imposing such a condition on the defendant.

It is sworn on the part of the plaintiff, and not denied, that the defendant has a letter which the plaintiff's Solicitor wrote to him in reference to the matters in question; but he has not mentioned this letter in his affidavit. I think an order must go for its production.

The defendant admits in his answer that he has in his possession the original agreement mentioned in the pleadings; but he has not referred to it in his affidavit. There was read to me on the argument an affidavit by his Solicitor, stating his belief that the admission was made in error, but the defendant himself has made no such affidavit, and the order for production of the agreement must therefore go, unless the defendant desires time to file an affidavit.

The defendant Noel says, that, except as agent and manager of the Bank he has no books or papers in his possession or power relating to the matter in question. But he is bound to set forth a list of those which are in his possession or power as such agent and manager, whether he is bound to produce them or not. *Lazarus v. Mozley*, 5 Jur. N. S., 1119. I incline to think he should be required to produce them.

Mr. Macgregor referred to the general order of June, 1853, (order 6, rule 7), to show that the Bank was not a necessary party to the suit, being sufficiently represented by Mr. Noel,

as the trustee to whom the Bank assigned the limits. This position was not controverted on the part of the defendant ; and I therefore assume for the purposes of the motion that the Bank is not a necessary party to the suit. (*King v. Keating*, 12, *Grant* 29). The observation of Lord Langdale, in *Richardson v. Hastings* (7 Beav., 356), appears then to apply :—"I think that the defendants cannot refuse the production on the ground, that other persons not parties to the cause have an interest in them ; it having been determined that those other parties are not, under the circumstances of the case, necessary parties to this cause. *Ford v. Dolphin*, 1 Drew, 223—see also *Morrell v. Wootten*, 13 B., 105. *Few v. Guppy*, Ib. 457, was referred to as showing that a trustee will not be ordered to produce documents in the absence of his *cestui qui trust*. But that case was before the passing of the statute (15 and 16 Vic., 86, §42, rule 9) which authorises trustees to represent their *cestui qui trust* (see *Penkethman v. White*, 2 W. R., 380).

The order will say nothing as to the costs of the motion, as I am of opinion they should be costs in the cause.

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## BROCK v. SAUL.

6th June, 1867.

*Opening biddings.*

Biddings will not be opened and a sale set aside on the grounds that a party (the defendant) was prevented from bidding by promises made to him by the purchaser, such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit.

This was a motion in the nature of a motion to open the biddings, being a motion for an order to have the defendant declared the purchaser, or for a re-sale of the premises. It was alleged on the part of the defendant, that he had desisted from bidding in consequence of promises made to him by, and of the conduct of the purchasers.

*Mr. S. H. Blake*, appeared for the defendant.

*Mr. Strong, Q. C.*, for the purchasers.

*Mr. Jones*, for the plaintiff.

For the motion, it was contended that the purchasers became, in consequence of their conduct and representations, the agents of the defendant, and should be declared trustees for him, and he be entitled to the benefit of the purchase.

On the other side, it was urged that a fair price had been obtained; that no advance was offered now on the price; and that the defendant had the offer made to him to take the property on certain terms, but declined; and it was contended that the relief now sought could not be afforded on a motion in Chambers.

THE CHANCELLOR.—I cannot grant specific performance on an interlocutory motion; and, so far as the case rests upon the contention that the purchasers, Gleason and Gundry, bid and signed the contract of sale as agents for the defendant Saul, I must leave him to his bill on which to establish that case. A mere advance offered would not of itself be sufficient to open the biddings. The case then is reduced to the single consideration, did or did not the purchasers, by act or word, deceive the defendant Saul or his

son, so as to induce the one or the other to refrain from bidding at the sale? John Saul says he bid for his father \$1,100,—that he had not the money to pay the deposit even on that sum, and asked the plaintiff to give him time, which was refused; and as the plaintiff states, because he knew that John Saul was an insolvent, as indeed, practically, was his father on whose behalf he alleges he made his bid. Now, it is quite clear, that unless the plaintiff consented to waive the deposit or to give time for the payment of the purchase money, any bid by, and for, the defendant, was illusory. The allegation on the one side is, that the purchasers told the defendant and his son that if they did not bid beyond the \$1,500 just then bid by the purchasers, that the defendant might have the property for that sum. The circumstances stated in answer to this allegation, I think, disprove it. What object was there in asking the defendant not to bid higher? It was known that he could not pay the deposit, and all the plaintiff need do was to require that in default of payment of it the sale should go on. Even if the defendant were to be treated as the purchaser, he could not have carried it out, because he does not pretend that he had any means of doing so, except through Mr. Mackenzie, whose offer the defendant refused. What object could there have been in the defendant's bidding more? The most I think that could be made out is, that the purchaser bought as his agent; in which case he must be left to his bill for specific performance; or, that after the property had been knocked down to the purchasers, and I think this was the fact, they promised to let defendant have it on getting their expenses and money out of pocket, if defendant could arrange with plaintiff. It is true, the purchasers have broken their promise; but I must leave defendant to any remedy he may have for that by suit. If I could see that defendant's conduct at the sale had been in any way affected, or his position altered, by the acts of these purchasers, I would relieve him; but I do not think it was, and I think it would be very impolitic and unwise to interfere with a sale, merely in the hope or chance that defendant may effect a better arrange-

ment with some other purchaser, or with his creditor. I refuse the motion with costs.

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### WILSON v. BRUNSKILL.

Saturday, March 30, 1867.

*Production of documents—Privileged communications.*

In a case between vendor and purchaser, where a defendant who was called on to produce a certain letter which he refused to produce on the grounds "that the same is and contains an opinion from the said Magrath, who was then acting as my Counsel and Solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my Solicitor, relative to my said title;" It was held to be a privileged communication, and a motion to commit for non-compliance with a notice to produce was refused with costs.

The executors of Widmer, deceased filed a bill against Thomas Brunskill and others, purchasers from Brunskill, of building lots, portions of a block purchased by Brunskill from Widmer, to foreclose a mortgage given by Brunskill to secure the purchase money, dated 3rd December, 1856. To this bill defendant answered, setting up want of title in the vendor, and charged fraud and misrepresentation.

In the course of the cause the plaintiff served a notice to produce documents, and defendant in his affidavit on production referred to a letter in the schedule showing documents in his possession which he objected to produce, in these terms:—"I object to produce the said letter because the same is a confidential communication between my former Solicitor and myself, relative to matters in which the said Magrath was then acting as my Solicitor."

Brunskill was cross-examined on his answer, 14th June, 1866, and in the depositions taken is the following passage:—"Mr. Hamilton asks—'Will you produce a letter from Mr. Magrath to you, dated 5th December, 1866?' Mr. Brunskill says—'I will not produce it, as it is a confidential letter between my Solicitor and myself.' This letter refers

to Mr. Small's claim. Mr. Hamilton asks—"Did this letter refer to Dr. Widmer's being a director of the Bank of Upper Canada?" Mr. Brunskill answers—"I refuse to state anything about this letter, as I consider it a privileged communication."

In December, 1866, a motion was made in Chambers before the Judge's Secretary, for an order to commit Brunskill for contempt in refusing to produce the letter above referred to on two grounds:—First, that the excusing words in the affidavit (quoted above), were not sufficient to satisfy the practice, as they did not state whether the letter related to the title in question, or to matters before or after legal proceedings were instituted or not; and second, because the letter being *from* the attorney to the client was not a privileged communication, *McDonald v. Putnam*, 11 Grant 258, and cases in 13 Jurist, N. S. 973, and 1 Sim. N. S. 3, were referred to.

THE SECRETARY refused this application with costs, on the grounds that the letter related to defendant's title.

From this decision plaintiff appealed, on the grounds, First, that the affidavit was not in form sufficient to protect; and secondly, that the letter was not privileged, but should be produced.

THE CHANCELLOR.—The affidavit on production admitting that the defendant had in his possession a letter from Charles Magrath to him, endeavours to excuse the production of it by saying that "It is a confidential communication between my former Solicitor and myself, relative to matters in which the said Magrath was then acting as my Solicitor." Every confidential communication between a man and his Solicitor is not privileged. The affidavit does not state that the letter relates to matters in dispute in this cause, excepting inferentially by means of the first paragraph of the affidavit of the defendant in which the deponent refers to the letter as "a document relating to matters in question in this suit." It does not even allege that the matters referred

to in the letter were in dispute at the time, or involved any opinion of counsel upon defendant's title, which he had a right to have protected. The communication may be of some fact merely come to the knowledge of Magrath, and communicated by him to the defendant, which the latter would be bound to disclose, and as to which there could be no protection. Many things pass between a man and his Solicitor which are not to be treated as privileged communications. The affidavit is not sufficient, and the defendant must produce the letter unless he can file a further affidavit alleging sufficient excuse.

On the hearing before the Secretary the examination of the defendant on his answer was referred to, and it, taken with the affidavit, was held by the Secretary to show a sufficient excuse for non-production, on the hearing of the motion before me, nothing but the affidavit is used, and it alone I think insufficient. But in consequence of what occurred before the Secretary, and the ruling thereon had, I allow the time for a further affidavit; the defendant first paying the costs of the application before the Secretary and before me.

A further affidavit was then filed, in which the deponent stated "that the letter from Charles Magrath to me referred to, &c., bears date on the 5th day of December, 1856—I say that I object to produce said letter under the order to produce in this cause, because the same is and contains an opinion from the said Magrath, who was then acting as my Counsel and Solicitor in the matter of the purchase of the lands and premises in this cause upon my title to the said lands and premises, and because the same is a communication between myself and my Counsel and Solicitor relative to my said title, and I claim the same to be on these grounds privileged."

Another motion to commit for non-compliance with the order to produce was then made, when the following judgment was given:

MOWAT, V. C.—I think I cannot grant this motion consistently with the case of *Pearse v. Pearse*, before Lord

Justice, then Vice Chancellor, Knight Bruce (1 DeG. & S. R. 12); and *Manser v. Dix*, before Vice-Chancellor Wood (1 K. & J. 457). *Pearse v. Pearse* was approved of by the Master of the Rolls in *Ford v. DePontes* (5 Jur. N. S. 993). There seems to have been no appeal in any of these cases, and no latter case was cited to me. My brother Spragge pointed out, in *McDonald v. Putnam* (11 Grant, 264); that the discovery sought being between vendor and purchaser upon a question of title, these decisions are not opposed to those of earlier date, on which he proceeded in the case before him, which was not one of vendor and purchaser, or title.

I must refuse the motion with costs.

NOTE.—This case appears at page 137 of the first number of these reports, but owing to the transposition of a page of manuscript the latter part, relating to the appeal, was printed on pages 106, 107, commencing at last line of page 105. It is now reprinted in correct shape.

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#### RE CALDWELL ESTATE.

*Petition under 29 Vic. ch. 28, sec. 31.*

An administrator was desirous of converting saw logs into lumber, for the benefit of the estate he represented, an application under 29 Vic. ch. 28, sec. 31, was entertained, and an opinion of a Judge given in favour of the course suggested.

The petition of Thomas White, administrator of the estate of Rowland Caldwell, late of the Township of Nelson, lumber merchant and saw miller, who died intestate, leaving his widow and five children, infants, under sixteen years, him surviving, stated: that intestate had before his death collected at his saw mill, a large quantity of logs for the purpose of manufacturing or converting them into lumber; but (except a portion of the same which had been converted into lumber by petitioner) the said logs still remained at the mill in their unmanufactured condition; that said logs con-

tained about 1, 500,000 feet of lumber, and in their present condition were not worth more than \$3 per thousand feet, or \$4,500; that the present average price of such lumber in the Canadian market was \$12 per thousand feet, or \$18,000, delivered at the port or railway station nearest to the mill, and more could be realized for it in the American market where Canadian lumber was usually disposed of; that the cost of manufacturing the logs into lumber, and placing it in a position to bring the market price, including cost of insurance, work, labour, mill expenses, carriage, &c., would not exceed \$4 per thousand feet, or \$6,000; so that after adding that sum to the original cost and deducting their amount from the price the lumber would bring in the Canadian market, there would remain a clear profit to the estate of \$7,500, and a larger profit could be realized if the same were to be sold in the American Market. That the petitioner has already received an offer or tender of \$11 per thousand feet for all sound lumber the logs would produce, but had refused it, believing a better price could be obtained; that the logs could be converted into lumber in about four or five months, and if the state of the roads and navigation permitted, the lumber could be sold and price realized during the present season; but under other circumstances it might not be brought into the market until next spring or summer; that unless the logs were manufactured at once they were liable to decay by remaining in their present condition, to the injury of the estate, &c. That the logs could not be disposed of in their present condition, except to the disadvantage of the estate; that the market prices of such lumber were not likely to depreciate during the present season; that the personal estate of the intestate, exclusive of the logs, was much more than sufficient to satisfy the claims of all the creditors of the intestate, and that the petitioner is in a position to pay such claims immediately; that the widow of the intestate was desirous that the logs should be converted into lumber, and that the petitioner believed the same should be done, but was advised that he could not do so with safety to himself

without the opinion, &c., of a Judge. The petitioner prayed that he might receive the opinion, &c., in the premises, and costs of the application.

Mr. *W. Ault*, for Mrs. Caldwell, widow of intestate, appeared, and consented to opinion being given, that the petitioner should manufacture the logs into lumber as prayed.

Mr. *F. Fenton*, for petitioner, cited *Labouchere v. Tupper*, 11, *Moore*, Privy Council, 198, and cases collected in Williams on Executors (6th edition, 1867), pages 1654, 1657, to show that executors and administrators could not without protection of the Court of Chancery carry on the trade of the deceased, even for the benefit of the estate, except at their own risk; and suggested that it might afterwards be disputed whether the logs in question were unfinished manufactures in the sense used in *Marshall v. Broadhurst*, 1 Cromp. & Jerv. 405, which it would be the duty of the administrator to complete. This was a proper case for judicial opinion under the Act: See 2, Daniels Ch. Pr. (4th edition, 1867) 1877, and cases there collected; *Re Williams*, 1 Ch. Cham. Rpts., 372.

MOWAT, V. C., after reserving judgment, decided to give his judicial opinion that under the circumstances in the petition mentioned, it is fit and proper, and for the benefit of the persons interested in the estate, that the logs in the petition mentioned should be manufactured and converted into lumber, as in the petition mentioned, and disposed of by the petitioner in the manner most beneficial for the interests of the estate. The costs of the application to be taxed and paid, or retained by petitioner out of the estate.

*Order accordingly.*

**IN RE McBRIDE—FARLEY v. DAVIS.***Retaining fee.*

No retaining fee will be allowed to a Solicitor who is himself also Counsel.

**THE SECRETARY.**—The Solicitor applies for an order that the Master do review his taxation, and directing the Master to allow a retaining fee of five pounds (£5) which the Solicitor had charged. The sum of \$15 appears to have been paid by the client, for which the Solicitor gave a receipt as "on account of retaining fee." The Master on taxation disallowed the retainer, and gave the client credit for \$15 as paid on account of costs generally.

In England there is no such thing known as a retaining fee to a Solicitor. It is a fee paid to Counsel only, and is paid to secure his services either in a particular suit or generally for any suit the client may be intreated in. I do not think the argument, that the Solicitor being in this country both Solicitor and Counsel, the retaining fee is chargeable as if paid by the Solicitor to retain his own services as Counsel, a sound one. If employed as Solicitor, it is his duty to devote himself to further the interests of his client, and he certainly could not consistently with that duty hold a brief as Counsel for the other side, so his services, if he intends acting as Counsel, are already secured.

A retaining fee to a Solicitor is just a gift without any consideration, and the same rule must apply to it as to any other gift from a client to a Solicitor.

No evidence is given here that the Solicitor explained to his client that the payment of such a fee was wholly voluntary—that even if successful in the suit, the amount of such fee could not be recovered from the other side as part of the costs. I think it was incumbent on him to show that he did this, and that the client, with full knowledge of that, paid the money. As he has failed to show that, I think I must refuse the application with costs.

## SOMERVILLE V. KERR.

*Bill remaining on the files unserved, entitling affidavits, &c.*

Where a bill had been filed and a *lis pendens* registered, but no office copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs. Affidavits, &c., need not in their entitling distinguish the parties by original and amended bill, it is sufficient to describe them as the now parties to the suit.

*Mr. McGregor* moved to take the plaintiff's bill off the files, or that the same be dismissed with costs "for want of service."

*Mr. Hurd*, contra.

It appeared that a bill had been filed in May last, and a *lis pendens* registered, but that no copy of the bill had been served within the twelve weeks provided for by Order 5, of February 6, 1865. The plaintiff had subsequently filed another bill and registered a second *lis pendens*, which latter bill had been served.

For the defendant it was contended that, under these circumstances, the existence of the first *lis pendens* was a cloud on defendant's title, and ought to be removed by the bill being taken off the files, or if that could not be done the bill should be dismissed.

*Mr. Hurd*, for the plaintiff, objected that the affidavits on which the motion was granted, were improperly styled as not containing the names of the parties by original bill, and also by amended bill—and as to the merits he argued that the first bill and *lis pendens* were at the utmost merely void, and that the Court would not interfere to enjoin the removal of a void instrument, or to prevent its registration, citing *Hurd v. Bellington*, 6 Grant, 145, and *Arnold v. McLean*, 6 Grant, 242.

THE CHANCELLOR.—Although it was usual under the old practice to move to dismiss a bill only after service, yet I apprehend that a defendant before such service, might at any time come in the interim and make himself a party to the suit, the bill being once on the files. Here the proceeding is

not merely *in personam* but *in rem* by reason of a *lis pendens* having been filed. Order 5, of 6th February, 1865, was passed expressly to get rid of the scandal of the delay so frequent in the Court, occasioned by placing bills on the files, no matter what charges of fraud or objectionable matter they might contain and leaving them there unserved. This order necessarily gives rise to a new practice, or to an extension of the old practice to cases coming within the order; and as I cannot take the bill off the files, as there is another defendant who does not complain here, I must take the only other course open to me of dismissing it with costs, as against the defendant who does complain that it has remained on the files of the Court for upwards of twelve weeks unserved. The title of the affidavit need not distinguish the parties by original and amended bill: it is sufficient to describe them as the now parties to the suit. (See Braithwaite's, Pr. 560).

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#### SWAN V. MARMORA IRON WORKS COMPANY.

##### *Payment of money out of Court.*

A power of attorney or other written authority is necessary to authorise the payment of money out of Court to the Solicitor, even though the parties to whom it is coming are numerous and not resident in America. The additional circumstance of the money having been realized from the sale of property mortgaged to secure negotiable debentures, which were in the possession of the Solicitor since the institution of the suit, *Heid*, not to dispense with the necessity of a power of attorney.

*Mr. Bell*, Q. C., applied to have certain moneys in Court paid out to him under the circumstances appearing in the judgment of the Vice Chancellor.

**MOWAT, V. C.**—This was a suit for the sale of certain property mortgaged, as I understand, to secure debentures issued by the Marmora Iron works Company, and of which the plaintiffs are holders. The property has been sold, and the purchase money, which was insufficient to pay the debentures in full, is now in Court. A motion is made to have the

amount paid out to Mr. Bell, the plaintiff's Solicitor, on his own affidavits that the debentures were sent to him for collection by Mr. Bischoff, one of the plaintiffs, and agent for the others, that they have been in the deponent's possession or power ever since; that the plaintiffs (thirteen in number) are scattered over different parts of the world, and none of them, as the deponent is informed and believes, reside on this continent. No written authority from Mr. Bischoff to the Solicitor is produced.

On an application of this kind it is for the Court, and not the Solicitor, to interpret the meaning of the instrument containing his authority, and to judge the extent of the authority it confers. The same remark appears to apply to the authority from the other plaintiffs to Mr. Bischoff to appoint a person here to receive the money out of Court.

Applications are frequently made here for the sanction of the Courts to the payment of money to Solicitors, without proof of any express authority from the clients to receive it. But the rule of the Court of Chancery in England, whose rules of decision are binding on us, has always been against such a course; a Solicitor in Chancery being held to have no implied authority to receive money paid or payable into Court. That rule has, I believe, been always acted upon in this country in mortgage cases as well as other matters, and has not been regarded as confined to claims for which the only remedy is in this Court; and the rule applies not only where the sums are large, but even where they are under £16, *Downing v. Picken*, 1 Kay, app. 1, Anon; 5 Jur. N. S. 385; *Brandling v. Humble*, Jacobs, 48; *Petty v. Petty*, 12 Beav. 170; *Armstrong v. Stockham*, 11 Jur. 97; *Hawkins v. Dod*, 1 Hare, 146. Where the amount is large the propriety of paying it to the Solicitor, even though armed with a power of attorney, has been doubted, 3 Danl. Prac. 2,032 Perkins' Ed., *Hill v. Chapman*, 11 Ves, 239.

It is, at all events, quite clear from many cases that the absence of the clients from the country, or the large number of them, is no ground for dispensing with a power of attorney or other written evidence of express authority to receive the

money out of court. In *Waddilove v. Taylor*, 13 Jur. 1,023, the client was out of the jurisdiction, and had given written authority to his Solicitors to take any proceedings in the suit that might be necessary for obtaining the client's share of the funds out of Court. But *Sir James Wigram*, V. C., declined to make the order, holding that a specific and special authority was necessary, such as a power of attorney, or a letter properly verified, authorizing an express application for the money or the fund. *Fell v. Jones*, 17 Beav., 521.

The only case I have met with in which the signature of a party was dispensed with in consequence of his absence from the country, is *Staines v. Giffard*, 20 Beav. 484, where twelve persons were entitled to sums which are stated to have been small, although the exact amounts are not given, and of them eleven had signed the necessary document authorizing the Solicitor to receive the money, but the twelfth was in America; "Under these circumstances," the learned Judge said, he would "dispense with the signature in that particular case, on the undertaking of the Solicitor to pay the same over."

In *Kilsall v. Minton*, 2 Beav., 361, a sum of £38 17s. was payable out of Court between fourteen persons, and an application was made to have it paid to the Solicitor, he undertaking to have it distributed among the parties; and this is reported as the judgment of the Master of the Rolls:—"The Master of the Rolls said he was desirous of saving expense to these parties, but the rule which he had adopted, and which must be followed on this occasion, was not to make any such order, unless the petition praying for payment to the Solicitor was signed by the parties, or unless a written authority was produced signed by the parties, stating that they were desirous that their money should be paid to the Solicitor. This rule had been adopted for the purpose of satisfying the mind of the Court that the parties were aware of their rights and of the amounts they were entitled to receive." This case, as well as *Brandling v. Humble*, Jacobs 48, and other cases show that the large number of the parties entitled to receive the money makes no difference.

In *Brandling v. Humble* the Master of the Rolls said one of the objections to such orders was "the jealousy the Court entertained of allowing the money of the suitor to come into the hands of the Solicitor."

The Solicitor has filed a second affidavit, stating that the debentures are payable to bearer and transferable by delivery. Assuming this to be so, does the circumstance make any difference? Does the delivery of them to a Solicitor imply an authority to the Solicitor to receive the money in case it should be realized through proceedings in this Court? I cannot say it does, for it was necessary to deliver them to him in order to enable him to bring the suit here. I have looked for some authority that might enable me to attach the desired importance to the circumstance alluded to, but have failed to discover any. He offers to give security for the due application of the money, but no precedent was cited for dispensing with the proper authority upon any such condition. The application must be refused.

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GOURLAY v. RIDDELL.

June 18.

*Motion to commit.*

Service of notice of motion to commit on the Solicitor of the party charged with contempt, is good service.

*Mr. Bain* moved to commit the plaintiff for non-production of accounts in the Master's office.

*Mr. Spencer, contra,* objected that notice of a motion of this nature, involving the liberty of a party, should be served personally, and not on the Solicitor of the party sought to be attached, and cited *Rider v. Kidder*, 12 Ves. 202, 203; *Weston v. Faulkener*, 2 Price, 2; *Mullens v. Williamson*, 2 Milloy, 380.

*Mr. Bain*, in reply, contended that the objection came too late, as, if tenable, it had been waived by repeated enlargements; and on the merits he urged that the practice of

the Court had been long settled, that service on the Solicitor was sufficient.

THE SECRETARY.—I think the defendant's application must be granted. Personal service of the notice of motion to commit on the plaintiff's Solicitor was sufficient. Order 46, sec. 9, points out the mode of enforcing the production of documents under order 20; that is, in the Registrar's office, before decree, and expressly provides for personal service of the order *nisi*; but this order never applied to production in the Master's office. In the latter case the order *nisi* by its terms required the party to obey it "within four days after service of this order upon him or his Solicitor," and service of the order on the Solicitor was always held sufficient to warrant the issuing of an attachment. 2 Danl. Pr. (Perkin's Ed.), 1364; Smith's Pr. (1887), pp. 157, 120; *Kemp v. Wade*, 2 Keen, 686; *Hobson v. Sherwood*, 6 Beav. 63.

By the recent orders of Court, orders *nisi* have been abolished, and instead, notice of motion is now served for an order absolute in the first instance. This, however, has not made any further change in the practice. Where the order *nisi* had, under the former practice, to be served personally, the notice of motion must be served personally, and where service on the Solicitor was formerly sufficient, it is now. *Dickson v. Dickson*, 1 Cham. R., 366.

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SAUNDERS V. FURNIVALL.

September 20.

*Security for costs of appeal.*

In bonds for security for costs of appeal, there should be two sufficient sureties, and if one dies, or becomes insolvent, another will be ordered to be substituted. *Brigham v. Smith*, Cham. R., 834, overruled.

In this case, a bond for security for costs of appeal had been given, with the usual two securities. One of them afterwards became insolvent, and a motion was made before

the Secretary for an order that a new surety should be substituted. This application the Secretary refused, with costs, following the decision of the Chancellor in *Brigham v. Smith*, Cham. R. 334. From this decision the parties now appealed.

*Mr. E. Henderson*, for the appeal, drew the attention of the Court to the orders of the Court of Appeal. Orders 4, 5, and 28.

*Mr. H. Cameron*, contra, argued that the practice was well established that but one surety was necessary in ordinary bonds for security for costs; that two had been given here in accordance with the rules of the Court of Appeal, and it was done to provide for such an event as one dying or becoming insolvent. He cited *Beaton v. Boomer*, Cooper's C. and P. R., 63.

**THE CHANCELLOR.**—*Beaton v. Boomer* is no authority in this case; it applies only to cases of security for costs of a cause in Chancery and not in the Court of Appeal—there the orders of that Court must govern. His attention had not been called to these orders in the argument of *Brigham v. Smith*, and he had therefore decided according to what was the practice of this Court; but, on looking at the orders, he considered that this was wrong, and that he must overrule *Brigham v. Smith*; but he did so without giving costs of the appeal, as the Secretary was right in following that decision.

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#### HAMILTON v. HAMILTON.

*Guardian ad litem, setting aside appointment.*

An order appointing a guardian *ad litem* was set aside for irregularity where it was shewn that the notice of motion for the appointment did not allow the infant six weeks to appear and shew cause, but the guardian thus irregularly appointed was allowed his costs up to decree.

This was a motion to set aside the appointment of the guardian for the infant defendant, Richard Melville, for

irregularity, and to vacate the said appointment on the ground that the notice of motion for the appointment of the guardian did not allow the infant (who, as well as the father of the infant, lived in Montreal), six weeks to appear and shew cause, as required by Order 6, of 10th January, 1863. And, also, on the ground of collusion between the guardian of the infant and the Solicitor for the plaintiff in the cause, in procuring a sale instead of a partition of the property; and, also, on the ground that the interests of the infant were not being properly attended to by the present guardian. The bill was for administration of the estate of the late — Hamilton of —, deceased, and the decree directed an enquiry as to whether a sale or partition would be more for the benefit of the infant defendant. It appeared from the proceedings in the cause, and from the affidavits filed, that one or two appointments in the Master's office had been attended by the plaintiff's Solicitor for himself as well as for the infant defendant, though not till after an adjournment had been obtained by the guardian for the infant, for the purpose of considering the questions which would arise on the said appointments respecting the interests of the infant defendant. It also appeared that negotiations had been pending on the part of Mr. E. Martin, Solicitor, of Hamilton, for the removal of the guardian, and the substitution of the said E. Martin, as guardian, in his stead. During these negotiations, however, the guardian for the infant received a letter from the father and next friend of the infant defendant (the present applicant), which seemed to ratify and confirm the said guardian's appointment, and which induced the said guardian to refuse to accede to the proposition made by the said E. Martin, that the said guardian should resign, and allow the said Martin to be appointed guardian in his stead.

*Mr. John Hoskin*, appeared on behalf of the infant, who applied through and in the name of his father as his next friend.

*Mr. Robert Sullivan* appeared as counsel for the guardian of the infant.

*Mr. John Bain*, for the plaintiff's Solicitors.

**MOWAT, V. C.**, considered that no case of collusion was established, as alleged in the notice of motion; and that it was not clear that the proceedings taken were not for the benefit of the infant defendant.

His Lordship set aside the appointment of the guardian as irregular, but considered that the guardian was not responsible for an irregularity in his appointment, as he was not bound, on being served with the order appointing him as guardian, to enquire into the regularity of the order. He considered that under the circumstances the guardian for the infant was not entitled to his costs of opposing the motion; but that he ought to have his costs up to the decree in the cause, but no further.

His Lordship directed that the order appointing the guardian for the defendant should be set aside as irregular, and that Edward Martin, one of the Solicitors of the Court, should be re-appointed guardian in his stead, on the said Martin's filing an affidavit of his having no interest, and of the father of the infant having no interest adverse to that of the infant. The costs of the motion and of the guardian for the infant to be paid by the plaintiff, and added to the plaintiff's costs. No costs of the motion allowed to the guardian.

The sale was stayed in order that the Master might review his report.

The plaintiff was to bear all the extra costs occasioned by the postponement of the sale.

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**ARMSTRONG V. CAYLEY.***Jurisdiction—Arbitrator.*

This Court has jurisdiction to carry out the terms of an award which directed the payment of money, although the reference contained no submission to pay, where the reference has been made an order of the Court, and will in such a case order a reference to the Master, and not oblige the party to sue at law.

The judgment in this case reported *ante* page 128, affirmed on appeal.

This was an appeal from an order made in Chambers by Mr. V. C. Mowat. The submission set out fully in the report of the case in Chambers (*ante* page 128), shows the facts agreed on between the parties.

*Mr. Hoskin* appealed from the order made on the grounds that there being no submission to pay, no order could be made for payment, and that that part of the order that directed payment of the amount to be found by the Master was bad. That the proper course was to have sued at law on the award. The arbitrators could not properly have fixed a time for payment, neither now could the Court. For aught that appeared, the executors (the defendants) might have a set off, of which they could only have availed themselves when sued at law, and objected that the arbitrator took evidence contrary to agreement between the parties. Russell on Awards, 318; Fry on Spec. Perf., 474.

*Mr. Burns*, contra, supported the order, and submitted that though the present order was not appealed against by him, he considered it did not sufficiently sustain the award, and should have given him the amount as found by the arbitrators, that being the intention of the parties in submitting the items to him; but, as the Court did not view it that way, he was content to abide by the order as made, and which he contended it was quite competent to the Court to make and to enforce. He cited *Davis v. Price*, 10 W. R. 864, 6 L. T. Q. B. 713, Russell on Awards, 313, and urged that the submission having been made a rule of Court, the Court would enforce it in the ordinary way. As to the

objection respecting the reception of evidence, counsel had attended and made no objection at the time, and it was too late to urge it now.

THE CHANCELLOR.—I think the judgment of my brother Mowat right upon the case as argued.

The submission has been made an order of this Court, and that order still stands, thus giving this Court possession of the matter, and the only way in which effect can be given here to the award is by order, and by reference, if necessary, to the Master, instead of the course which at law might be pursued by action where a jury would assess the amount. Here this is done by the officers of the Court in this as in ordinary cases. The same strictness does not now prevail at law in enforcing an award. An order is applied for to be followed by execution. It was different when an attachment was sought for as a punishment for contempt. It would seem that an order to pay to be followed by execution will be granted now whenever an action at law would lie upon the award.

There are two items of claim not disposed of specifically by the arbitrator, and which might effect the finality of the award, viz.: 1st. The ten per cent. claimed on notes discounted. 2nd. Costs of action on the covenant in the mortgage. This was not urged as an objection against the award, and it can be cured by Armstrong undertaking to abandon and release these claims. The Master should give credit for the \$50 referred to in the award, if he finds it was paid. The arbitrator was not authorized to take any such account, though this item was not objected to here either.

Order to be altered accordingly, but appeal dismissed with costs.

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**ATTORNEY GENERAL v. THE TORONTO STREET RAILWAY.***Signature to information.*

There is no precedent for dispensing with the signature of the Attorney General to an information.

Where in the absence from the Province of the Attorney General an information was filed without signature, but having endorsed thereon a fiat signed by the Solicitor General, it was ordered to be taken off the files.

In this cause an information was filed at the relation of certain parties, liberty to file which purported to have been granted by the Solicitor General.

An application by the defendants was made in Chambers for an order to take off the files the information, and to set aside the service thereof, on the ground that the information, although purporting to be filed by the Attorney General, was not signed by him; and that if the Solicitor General had given leave to file the said information, it should have been filed in his name instead of that of the Attorney General; and because in place of a fiat being placed upon the information, it should have been signed by the proper officer; and because the copy of the information filed did not contain any fiat or signature whatever.

*Mr. S. H. Blake*, in support of the application, cited, *Ex parte Skinner*, 2 Mer. 453; *Attorney General v. Fellowes*, 1 J. & W., 254; *Attorney General v. The Ironmongers Co.* 2 M. & K., 577; *Attorney General v. Wright*, 3 Beav, 447; *Rex v. Wilkes*, 4 Burr, 2537; *Mitford on Pleading*, p. 22; 1 Grant's Prac., p. 74; 1 Smith's Prac., 289; 1 Danl's Prac., 364; *Story's Eq. Pl.*, S. 69.

*Mr. Rae* and *Mr. Morgan*, for the informants.

**MOWAT, V. C.**—This is an information in the name of the Attorney General, but not signed by him, or any one for him. There is a fiat endorsed in the words:—"Let the within information be filed, James Cockburn, Solicitor General, U. C." and this, it is contended, is sufficient signing. This fiat is quite a novelty to me, and no ex-

ample of it was cited to me from the books. I know not whether it was adopted from a supposed analogy to the fias, "Let right be done"—“*soit droit fait al partie.*” A fiat by the Solicitor General requiring this Court to receive and file an unsigned information, is entirely without precedent or authority. If it was endorsed merely as a substitute for signing the information, there must, I suppose, have been some reason for departing from the simpler course demanded by the practice; and the fiat may have been considered to imply something different from and less than signing the information. I cannot assume that it meant the same thing.

But if it did, what then? Every bill needs the authority of the plaintiff; but the practice requires the sanction of the Attorney General to an information to be manifested in a particular way. What right have I to say that any other way will do as well? That a memorandum in the form of a fiat, signed by the Solicitor General, and endorsed on the information, but forming no part of it, and not endorsed on the office copy served, will do as well as the only method hitherto in use? I think I must hold such a course to be an unnecessary and unauthorized departure from the established practice of the Court, and therefore irregular.

Affidavits are filed shewing that the Attorney General was absent from the Province when the information was submitted for his sanction, and the question was argued on the motion, whether in such a case the signature to an information in the name of the Attorney General was the proper course (*vide ex parte Skinner 2 Mer. 453*), but on this point it is not necessary to say anything.

*Attorney General v. Fellowes* is an express authority that the want of the Attorney General's signature even to an amended information, where he had duly signed the original information, is a sufficient ground for taking the amended information off the files with costs. That must therefore be my order on the present application.

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## BENNETT V. O'MEARA.

*Demurrer.*

The omission of any formal part in a demurrer (such as the heading thereof), is an irregularity, which entitles the plaintiff to have the demurrer taken off the files, unless an amendment is permitted. An irregularity in the endorsement on pleadings of the name and place of abode of the Solicitor filing the same is waived by demanding and receiving a copy of such pleading.

*Mr. Boyd* moved to take demurrer off the files, on the ground that there is no heading on the paper filed purporting to be a demurrer. He cited *Pieters v. Thompson*, George Cooper, 249, *Granville v. Betts*, 17 Sim. 58, Biddle's Ch. Forms, 482.

It was also objected that there was no endorsement on the demurrer of the name of the Solicitor, or of his agent at Ottawa, where proceedings are filed. See order 43, section 2, Harrison's C. L. P. Act, 33-4.

It was also objected that the demurrer being filed at Ottawa, should have been endorsed with the name of a Solicitor residing there, and who filed the same either as principal or agent—whereas, it was endorsed with the name of Mr. Driscoll, of Pembroke, and he (Mr. Driscoll) had no booked agent at Ottawa.

*Mr. Peter Cameron*, contra, urged that there was no rule making it imperative that a demurrer should be in the form, and endorsed in the manner contended for ; and that as to the regularity of the service on Messrs. Scott and Ross, the plaintiff's Solicitor had treated them as the agents of defendant's Solicitor, in demanding an office copy which had been furnished by such agent, and there was no difficulty caused by their not being booked.

**THE CHANCELLOR**—Although there may be no value in any particular form, still, where it is recognized and observed in years of practice, it should be followed, else every one will be establishing a practice for himself. Let the demurrer be amended in this respect, defendant amending also the copy served, and without costs ; as the other part of the motion

to set aside the service on the ground that the defendant's Solicitor has no booked agents in Ottawa, fails, the plaintiff's Solicitor having demanded and received from Messrs. Scott and Ross, as agents for the defendant's Solicitor, a copy of the demurrer filed. The defendant's Solicitor should have them properly entered as his agents, to avoid difficulty in future services.

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### SOMERVILLE V. KERR.

#### *Security for costs.*

Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security for costs will be ordered to be given, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and is not shewn positively where he is resident.

*Mr. McGregor* moved for security for costs, on affidavits, showing—"That the said Thomas Somerville, formerly resided in the village of Weston, and continued so to reside there till some time in the month of March last, when he was committed to gaol for breach of an injunction of the Court of Chancery. That just before the said Thomas Somerville was committed as aforesaid, his goods were sold under execution. That some time in May last, said Somerville was released from gaol, and he came to the said village and remained there for a few days, when he disappeared and left the said village of Weston. That it is generally believed that said Somerville has gone to some part of the United States." Also, that previous to his incarceration, he had said in conversation, that he was going South.

*Mr. Hurd*, contra, contended that this was not a case of residence out of the jurisdiction. The bill did not state plaintiff's residence abroad, and the affidavits of defendants had not sufficiently established that fact.

**THE CHANCELLOR**—This case stood over for two weeks to enable plaintiff's Solicitor to ascertain where his client is;

he has failed in this. His client is described in the bill as of Weston, where it is clear he is not, and does not reside. Under these circumstances, and the affidavit of the defendant being in fact unanswered, and plaintiff's counsel now admitting that he cannot ascertain where the plaintiff is, I think the order for security for costs should go. See *Oldale v. Whitcher* (5 Jur. N. S. 84). As to the staying of proceedings till costs of former suit are paid, the plaintiff admits that the present suit and the former suit, which was dismissed for want of prosecution, are identical: the costs of the former suit are not paid, and all proceedings in this suit must therefore be stayed in the meantime in the usual way.

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#### BANK OF UPPER CANADA V. WALLACE.

##### *Leave to appeal.*

Leave to appeal was given to the plaintiff after the execution of a year, where it appeared that delay had been caused by the depositions in the cause having been mislaid by one of the defendants, and where the defendants, a banking institution, had in the meantime stopped payment, and their affairs, which were very extensive, had passed into the hands of trustees ignorant of the matter.

*Mr. Downey* moved for leave to appeal.

*Mr. McLennan*, contra.

It appeared that judgment had been given in this cause on the 19th December, 1865, decree entered 30th January, 1866. That the depositions had been lost and not found till 1st November, 1866. That a change in the directorship of the Bank had taken place, and that no conclusion had been come to by the new directors in this matter, until about three months ago. That since then, any delay that had taken place was occasioned by negotiations with the defendant Wallace, to which the other defendants, the Trust and Loan Company, were not parties.

The bill was filed in 1860. Judgment given in 1864, giving leave to file a petition, which was not done for a year, when the order now sought to be appealed from was made.

The defendants, the Trust and Loan Company, were given the conduct of the decree and Master's report as far back as 2nd April last, and the plaintiff's demanded and received payment of their costs. No notice of appeal has been given.

THE CHANCELLOR—I agree that only under very special circumstances should the Court interfere to grant leave to appeal. "*Sit finis litium*" is a maxim which the Legislature properly recognized, and they have fixed a year as the period during which a judgment of the Court below might be considered as uncertain, should the unsuccessful party in that interval avail himself of the right to appeal, and they intended that at the end of the year, if no appeal were in the meantime had, the rights secured or declared by the judgment might be possessed unquestioned. It is of the utmost importance that this should be borne in mind, that a man may know when he can safely deal with the subject or fruits of litigation. Here through no fault of the applicant, but through the accidental negligence of the other side, the evidence in the cause was mislaid for eleven months, and during this time the Bank was most pressing to prepare for an appeal. When the evidence was found, the Bank had stopped payment, and its affairs had passed into the hands of trustees ignorant of the matter, and who had thrown upon them suddenly a great mass of miscellaneous work. For some months they were in doubt what to do, and during that time they allowed the Trust and Loan Company to assume the conduct of the case in the Master's office, and they received from the latter the costs awarded to them by the decree. The appeal could not have been brought on earlier than March last after the evidence was found, and it might not have been heard then, as the Court had, I think, only three days at its disposal, and there has been no Court since. Considering the eagerness which the Bank shewed for an appeal within the year, and that appeal might and would, I think, have been brought on within that time if the defendants, the Trust and Loan Company, had not mislaid the evidence, and the difficulties which have arisen since in the

position of the Bank, the absence from the country of their leading counsel, through illness, and the great probability that the appeal would not have been yet disposed of, had it been heard in March last, the earliest time at which the Bank could have brought it on, and that all these difficulties and all this delay would have been avoided had the Trust and Loan Company not lost, or rather, in ignorance and by accident, withheld the evidence for the first eleven months after the judgment was delivered. I think it proper to permit an appeal on payment by the Bank of the costs of this motion and the proceedings in the Master's office subsequent to April last, should these proceedings be rendered abortive by the appeal, and that security for such payment and the repayment of the costs received by them be given if required.

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### McALPINE v. YOUNG.

#### *Setting aside sale.*

The "biggest bidder" at an auction sale is the "purchaser" under the General Orders of the Court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position. The omission in an advertisement of sale to state that the premises are leased advantageously will afford good grounds for staying the sale, but an application for such purpose should be made promptly and before sale. Where the plaintiff, who had the conduct of the sale, assigned his interest, and an order to revive making the assignee a party, was, a few days before the sale, taken out, but not served, and an order taken to substitute for the plaintiff's Solicitor the Solicitor of the assignee, and the case went on under the control of such new Solicitor, the Court set aside the sale, although reluctantly, as great delay had been shewn on the part of the mortgagor in making the application, and he was, under the circumstances, ordered to pay the costs incurred by the new sale.

This was an appeal made from an order of Mowat, V.C., refusing an application to set aside the Secretary's order confirming the sale made in this case, and reported *ante* page 86.

Mr. *Hodgins*, for appellants.

Mr. *S. H. Blake*, contra.

THE CHANCELLOR.—This is an appeal from an order in Chambers of my brother Mowat, refusing an application by a defendant, the mortagor, to set aside an order declaring one Young, a party defendant to the suit, to be the purchaser of the premises at a sale had under the order of the Court, and for a resale. The order sought to be set aside was made by my brother Mowat, and was opposed by the vendor, the plaintiff in the suit. The mortagor, who had allowed all the proceedings to go *pro confesso*, was not made a party to the motion, and though, had the attention of the learned Vice Chancellor been called to it, it is probable that notice would have been given to him ; he, however, moves now to have this sale set aside, upon the ground :—

First, That the advertisement for sale omitted to notice that the premises were let under a good lease.

Second, That Young never became the purchaser, inasmuch as the auctioneer did not at the close of the sale knock down the premises to him, or publicly declare him the highest bidder.

The sale was had in March, and this application was made to my learned brother on the——day of——last. The only excuse offered for so long a delay, is that the mortagor did not know that Young had been by the Court declared the purchaser at the sale, and that the vendor and the Master had treated the proceedings at the sale, as ineffectual, and were taking steps to make a fresh sale. The mortagor appears to have shown great indifference and neglect in the matter. Although he allowed all the proceedings to go by default, still it was his property that was being sold, and it is not too much to expect that he should become acquainted with the terms of the advertisement by which it was to be sold, and the circumstances attending the sale ; and if he does not do this, he should not be surprised to find that he is treated as having submitted to all that had been done.

I think we must assume that the mortagor knew the terms of the advertisement which was for his information as well as that of the public, and that he also knew the condition of the property. He does not swear that he was ignorant of

one or the other, and if he had, I doubt if we could have given him the benefit of an ignorance which ought not to have existed. We think that the fact of the lease ought to have been mentioned in the advertisement, as it might have attracted a certain class of bidders, and so had a material effect upon the price to be offered ; and had the mortgagor come to complain of this previously to the sale it would, doubtless, have been stopped.

But, while we hold the vendor, or party having the conduct of the sale, responsible for the proceedings in regard to it, and bound to see that everything is regular, and everything done to ensure the best and the fullest information for that purpose being given, yet we feel that it would be giving the owner of the estate an undue advantage, and lead to great delay and embarrassment if we were to allow him to lie by and permit a sale to proceed, taking the chance of its results, and then obtain from the Court relief, setting aside a sale, which an earlier application might have prevented altogether. It would be under very special circumstances of ignorance by the owner, of proceedings anterior to the sale, that the Court could be induced to interfere with it. None such exist here, and on this ground we, therefore, refuse to interfere.

As to the second ground, we think that when the bidding ceases, the person who had made the highest bid is, under the General Orders of the Court, the purchaser; and, that neither the vendor nor the auctioneer, nor any one else, can interfere and deprive him of his position. The auctioneer did, here, enter in his book of biddings that Young, the purchaser, was the highest bidder. It would have been better that he had publicly declared this ; but his omission to do so cannot effect Young's rights, which were settled by the practice of the Court declaring that the highest bidder shall be the purchaser. The Court, alone, can relieve against this.

It was for this reason that, as against the vendor, I treated Young as the purchaser, on a motion before the Secretary, as Young had been always ready and anxious to complete his purchase and the vendor had opposed it.

We do not think the mortgagor entitled to any relief on

this ground ; with some reluctance, however, considering the lapse of time since the sale, and the want of explanation by the morgagor of the great delay in making this application, beyond what was asserted by his counsel, that the sale was considered as an abortive one, and yet, feeling that the mortgagor may, as the Master did, have so treated it, we have come to the conclusion that it will be proper to rescind the order declaring Young the purchaser, and so set aside the sale, on the ground that a day or so before the sale, an order of revivor was obtained but not served, declaring that the suit had become defective by reason of the transmission of the plaintiff's interest to one Worts, and joining him as a co-plaintiff, and, that an order was also, about the same time, obtained, changing the vendor's Solicitor, of which order the Solicitor did not become aware until he had reached the auction room to superintend the proceedings at the sale.

We do not mean to say, that because the plaintiff had parted with his interest in the suit after the decree under which all parties had become actors in it, and entitled to its benefit, that therefore the suit abated or became so defective that it was necessary to revive it in the name of the plaintiff's assignee, as would have been the case had the assignment been made before decree. But we think that the change necessarily effected in the conduct of the sale by the withdrawal from it of the plaintiff, to whom it had been entrusted, and of his Solicitor, and the substitution in their place of strangers, on the very eve of that sale, was so likely to interfere with the proper conduct of it, that we ought not to allow it to stand, the plaintiff who was responsible to the Court for the proper management of the sale had abandoned it, had no further interest in it, and could no longer be a proper representative of the interests of the other parties ; the plaintiff's Solicitor for the first time learnt that his part and doing in it were gone when he entered the saleroom. Another Solicitor, just previously appointed for the assignee of the plaintiff, appeared there to control the proceedings, not as Solicitor for the plaintiff, but as Solicitor for the assignee, who was no party to the cause. And the assignee

himself swears that, though desirous to bid for the property a higher sum than that obtained, he found that representing the plaintiff's interest in the suit he could not do so, and that there was no time to obtain permission from the Court to enable him to bid. We think, that for the due protection of parties interested, and the proper conduct of the business of the Court, a sale under such circumstances should not be sanctioned. The purchaser here is an incumbrancer, and a party to the suit, not a stranger as against whom we would have found it difficult to interfere.

It may be hard for the parties to the suit to be thus delayed, but this risk is run in any case in which the vendor may so act as to invalidate a sale. All parties take their chance of his doing his duty, and the only recompense we can make is to order him to pay the costs of the proceedings, which his action in this matter has disturbed, and the costs of procuring another sale; as we do now, so far as the purchaser is concerned, although we give no costs to the mortgagor whose conduct since the sale in lying by so long has not been satisfactorily explained, and who seems to be acting in the interest of the plaintiff's assignee, though we have thought it right for the purposes of preventing mischief in similar cases, to relieve him from the sale itself.

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#### LUTHER V. WARD.

##### *Security for costs—Payment of deposit money out of Court.*

Where plaintiffs, who were residents out of the jurisdiction, had paid a certain sum into Court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated.

In this case a decree for specific performance of a contract to sell land was made in favour of the plaintiffs, directing them to pay the unpaid balance of the purchase money, deducting their costs of suit, which were allowed them. The

plaintiffs, who all reside out of Upper Canada, had paid \$400 into Court, in lieu of giving the usual security for costs.

*Mr. McGregor* now applied in Chambers, on behalf of the plaintiffs, for an order that the deposit be paid out to the plaintiffs. He contended that, as the deposit was only a security for costs, and the decree gave costs to the plaintiffs, they were entitled to have the deposit paid out to them.

*Mr. Downey*, on behalf of the defendants, opposed the motion. As the plaintiffs might fail to pay the unpaid balance, the defendants might possibly get the bill dismissed with costs, in which event they would be entitled to have their costs paid out of the fund in Court, which he contended should be retained to meet such a contingency.

THE SECRETARY refused the application, with costs. There was no precedent for such an order as that applied for; and the money was considered in the same condition as a bond, which would not be discharged till the final termination of the suit.

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#### UNITED STATES v. DENISON.

##### *Letters Rogatory.*

Letters Rogatory such as are provided for by an act of the Congress of the United States as issuable from any foreign Court, will be issued by the Court here, although in the present state of our law no reciprocal accommodation can be afforded here to suitors in the United States. In Letters Rogatory so issued here the usual offer to render similar service when required was necessarily omitted. Such letters need not necessarily be in the name of the Sovereign, but were issued as from the Judge of the Court of Chancery.

*Mr. Morphy*, on the part of the plaintiff, moved that "Letters Rogatory" may be issued from this Court addressed to the Circuit Court of the United States for the District of Kentucky, requesting the said Court, by the proper and usual process thereof, to cause Lewis B. Bates, of Jefferson County, in the said State, to appear before the said Court,

or some competent person to be appointed by the said Court, for that purpose to be examined *viva voce*, on oath, as a witness for the plaintiff in this cause. In support of this application he filed the affidavit of David Thurston of the City of Toronto, Esq., Consul of the United States, in which he alleged : "That Lewis B. Bates, formerly of the said City of Toronto, and in whose name at one time the vessel in question in this case was held, is, as I am advised, a material and necessary witness for the plaintiffs in this cause, and without his testimony justice cannot, I fear, be done therein;" that "he is at present in Jefferson County, in the State of Kentucky, one of the United States of America; that a commission was issued in this cause, and evidence taken in the month of July last, and among other persons intended to be examined as witnesses under the said commission was the said Bates, but he declined to attend for this purpose, although requested to do so by me, and, as I believe, by the Solicitor for the said plaintiff, and I have no doubt that unless means be adopted to compel him to give his evidence, he will still decline to testify, and his evidence will be lost to the plaintiffs; that by an Act of the Congress of the said United States, passed on the 2nd day of March, 1855, being chapter No. 140, of the 33rd Congress, it is amongst other things enacted; that where 'Letters Rogatory' shall have been addressed from the Courts of a foreign country to any Circuit Court of the United States, and a United States Commissioner designated by said Court to make the examination of witnesses in said letters mentioned, said Commissioner shall be empowered to compel the witness to appear and depose in the same manner as to appear and testify in Court; that with a view of compelling the attendance of the said Bates, under the authority of the said act, and to ascertain the mode of procedure, I communicated with the Hon. Mr. Speed, formerly Attorney General of the said United States, and have received from him a letter, &c., and also the form of 'Letters Rogatory.' "

*Mr. Bain, for the Attorney General.*

*Mr. A. Hoskin*, for the defendant, Thompson.

*Mr. G. T. Denison*, Jr., in person, did not object to the application being granted.

THE JUDGE'S SECRETARY.—The only difficulties in the way of granting this application arise from the fact that the Court cannot reciprocate the courtesy, and from the form of the Letters Rogatory themselves. The first difficulty may be got over here where the parties desiring this Court to request the interference of the United States Courts are the United States Government. To refuse to allow them to put the machinery of one of their own Courts in motion for the furtherance of justice would be exceedingly discourteous. The other difficulty may also be got over. From the form given in Greenleaf on Evidence, it would appear as if the letters should be in the form of a writ in the name of the Sovereign; but this is not essential. In Bouvier's Law Dictionary, a Letter Rogatory is said to be "an instrument sent in the name, and by the authority, of a Judge or Court to another." So, the instrument in the present case may be headed as from "the Judges of the Court of Chancery, &c., to the United States Court, &c."

In the work just referred to it is also said that, in Letters Rogatory, there is always an offer on the part of the Court to which they may be directed, to render a similar service whenever required. Unfortunately such an offer cannot be made in this case; but a clause may be added accounting for the omission of it, on the ground that the laws of Upper Canada do not permit the Court here rendering a similar service.

It is gratifying to find that such an Act as that under which the plaintiffs apply, exists in the United States; and it is worthy the consideration of our Legislature whether a similar Act should not be passed here. In the absence of some such arrangement between two countries situated as Canada and the United States are, the ends of justice might in many cases, be entirely defeated by a witness crossing the frontier.

## GILMOUR V. MYERS.

*Extending time for payment of mortgage.*

The time for payment of mortgage money was extended, where it was shewn that the defendant was hampered and hindered in selling or raising money on the lands in consequence of an advertisement signed and circulated by the plaintiff's Solicitors.

Under the above circumstances the motion was granted without costs to the plaintiff.

*Mr. Boyd* moved on part of the defendant to enlarge the time for payment of the mortgage money directed to be paid in this cause.

*Mr. Moss*, for the Commercial Bank and Bank of British North America.

The affidavit of defendant, filed on the application, read as follows :—

1. That the lands contained in the decree in this cause, not including some of them which should not have been included therein, are of very large value, exceeding in amount the amount decreed to be paid if time and opportunity could be had to dispose of them.

2. That many of the said lands are mineral lands, exceeding in quantity two thousand acres of mineral lands situate in the townships of Huntingdon, Madoc, and Belmont, all of which are fast increasing in, and will be soon of very large value.

3. That I have examined many of the said lands and find them to be as above stated, and have sunk two shafts, one of which I am now engaged at on lot 20, in the 5th concession of Madoc, and intend this present month to re-commence the other shaft.

4. That owing to the late developments at the Richardson mine, which lot is next but one to that where I am working, and at other mines a far increased demand has arisen for mineral lands ; that on lot 16 and in the 1st concession of Elziver, good veins of silver, and, I believe of gold, exist, and I have been present at, and examined two holes on lot No. 21, in the 7th concession of the township of Belmont, where

I have found a rich quartz rock at shallow depths as any I have seen in Madoc, in a similar position ; and, from information I have received, I fully believe that lots 22 and 23 adjoining the last named lots are equally rich in minerals, all the said lots being contained in the report in this suit.

5. That I have been hampered and prevented even attempting to sell, which I have not attempted by reason thereof, any of the lands in Madoc and Elziver, by reason of the printed notice accompanying this affidavit, signed by the plaintiff's Solicitors, which notice I found stuck up in the principal hotel in Madoc village, and I saw similar notices stuck up at almost every public spot in Belleville, the county town, as well as in the township of Madoc. I saw them stuck up on the court house, at Belleville, in and outside of the registry office, the hotels, and I was informed that one of them was posted upon the pump where the Madoc policemen watered their horses ; that, nevertheless, I have had many applications from persons desirous to open shafts on shares with me ; that the said notices were put up about the date thereof at which time there was a rush of miners to Madoc ; that from the accounts now current, and which I believe to be true, large numbers of persons, including many capitalists, are visiting and interesting themselves in that locality, and property is rising fast in value.

6. That by reason of the measures taken for the establishment of quartz mills, three being now in course of construction or completion in Madoc alone, and soon to be completed, I look to the early development of the lands in Madoc and Elziver, all of which I have caused to be examined, and I believe that these lands alone will, if I get time, prove sufficient to pay the sums decreed to be paid, and I therefore ask for six months' time. The notice alluded to in the above affidavit is in the following words, and signed by the plaintiff's Solicitors :— “ Notice.—Caution.—The following lands amongst others, in the County of Hastings, are ordered to be sold under a decree of the Court of Chancery for Upper Canada, viz. :—Lot 13, 4th concession (except five acres), Township of Madoc ; lot 30, fifth concession ; east

half lot 26, 6th concession Madoc ; lot 16, 1st concession ; lot 17, 1st concession of Elziver. The above lands are to be sold upon proceedings instituted against the owner upon a judgment, and consequently no evidence appears in the registry office of the Chancery proceedings. We warn all parties against purchasing any interest in these lands."

"March, 1867."

On the part of the plaintiff it was contended, in answer to this affidavit, that it did not show that the defendant had made any efforts to raise the money ; that the judgment on which the proceedings were grounded was recovered as long ago as 1854 ; that plaintiff was out of pocket large sums for taxes ; that the time for payment expired in August last, and great delay had taken place in making the present application.

*Mr. Moss*, for the Commercial Bank and Bank of British North America, also urged that delay had taken place in making the application, and that as to the hindrance created by the notice complained of, his clients were no parties to such notice, and in no way responsible for it, and consequently should not suffer.

**THE SECRETARY.**—The conduct of the plaintiff's Solicitor, in posting up notices warning the public against purchasing from the defendant any of the lands specified in that notice, was highly improper, and I think I must extend the time for payment to six months. This may seem hard upon the subsequent incumbrancers, who are not in any way answerable for the conduct of the plaintiff's Solicitors, but I cannot change the order of priority ; and to delay the sale of the lands referred to in the handbills, allowing the sale of the others to proceed now, might prejudice these incumbrancers almost as much as postponing the sale of all the lots.

The plaintiff is first in priority, and would be paid out of the proceeds of the first sale, while these incumbrancers might not get paid till the second sale. There are many cases where the conduct of the plaintiff may prejudice the

rights of other parties to the suit, and this is unfortunately one of them. As I think the plaintiff's Solicitors have acted in an exceedingly improper manner, I refuse them any costs of this application. The order will be for the defendant to have six months further time, on the usual terms, except as to the plaintiff's costs.

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#### McCANN V. EASTWOOD.

A Sheriff, in his advertisement of sale of lands seized under a *f. fa.* from this Court, had described them as the lands of the defendant, when they were those of the plaintiff. On an application on notice the return was allowed to be amended on payment of costs of the motion.

A motion was made on notice, on part of the defendant to amend a Sheriff's return to a *f. fa.* against lands, issued to recover certain costs ordered to be paid by plaintiff. It appeared that the Sheriff had advertised the lands of plaintiff for sale, but by mistake described them as the lands of the defendant. It was urged for the application that the practice at common law allowed such amendment. 1 Marshall, 344; Chitty, p. 592, 10th ed.

No opposition was made to the order, if considered right under the circumstances.

*Mr. Spencer*, for the defendant.

*McMichael, Fitzgerald, and Hoskin*, for the plaintiff.

THE SECRETARY.—From the authorities cited, it appears that at common law, a Sheriff's return made by mistake, may be amended when application is made promptly. Here, I do not think any party can be injured by my granting the amendment; and I do so on payment of costs.

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## STEVENSON V. NICHOL.

*Rehearing.*

Leave to rehear was given when the time for rehearing expired a few days before rehearing term, and the delay had not really affected the progress of the cause, there having been no sittings to rehear causes in the interval.

*Mr. Moss* moved for leave to rehear on part of plaintiff.

*Mr. McGregor*, contra.

It appeared from the affidavits filed on the application, that a misunderstanding had arisen between the respective Solicitors for the plaintiff and defendants as to the terms of a consent given by the defendant's Solicitor as to extending the time for rehearing—the plaintiff's Solicitor supposing the time to be extended to December. It was also shewn that no delay had really taken place, as there was no sitting in September, and that the plaintiff could not set down and rehear the cause in December, as the time in which he should rehear expired a few days before rehearing term in December.

THE SECRETARY, under the circumstances, allowed the plaintiff to rehear, the time within which he could rehear expiring only a few days before the December term—giving defendant costs of application.

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EASTMAN V. EASTMAN.*Next friend.*

A motion to change a next friend must be on notice.

*Mr. Henderson* moved *ex parte* to amend bill by substituting the name of a new next friend. He cited, Seaton on Decrees 1252, 1 Dan, C. Pr. 112, 367, note *w*.

THE SECRETARY.—I do not think I can make the other *ex parte*. When a next friend dies the Solicitor who acted

for the deceased next friend may apply to substitute another next friend *ex parte*. In all other cases a motion to change a next friend must be on notice. 1 Dan, C. Pr. 112.

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#### CURTIS V. DALE.

##### *Amending—Conveyance by an Insolvent.*

Leave to amend was refused when the proposed amendment was an allegation, that a mortgage was made whilst the mortgagor was in a state of insolvency.

It is competent to a debtor insolvent, or on the eve of insolvency, to prefer one creditor to another by the conveyance, or mortgage of real estate, the same rule applies to a surety.

SPRAGGE, V. C.—The proposed amendments objected to, I understand to be the allegation that the mortgage from Dales and Fitzgerald to Hamilton, was made while the mortgagor was in a state of insolvency, and in order to defeat creditors, and the allegation that the assignment from Hamilton to Currie was under the like circumstances as regards the mortgagor, and for the like purpose. The mortgage is for £2,000, and was made, as the bill alleged, to indemnify the mortgagees against the indorsement of certain promissory notes; and the assignment to Currie was made to him, it is alleged, as an alleged creditor. The application in this case to amend (or rather re-amend), was made before the case of *Newton v. The Ontario Bank* was heard before me; but the papers have reached me only recently, and since I gave judgment in that case. In that case I came to the conclusion that it was still competent to a debtor insolvent, or on the eve of insolvency, to prefer one creditor to another by the conveyance or mortgage of real estate; and I think the same rule would apply to a surety as to an ordinary creditor. He assigns the lands in which he has an interest as well as the mortgage debt. Consistently with *Newton v. The Ontario Bank* I should hold a bill impeaching a mortgage assignment upon these grounds only, to be demurrable;

and therefore must hold that they cannot be properly introduced into a bill by way of amendment ; the other amendments proposed may, I think, properly be made. The plaintiff Curtis to pay the costs of this application.

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#### UPPER CANADA MINING COMPANY v. ATTORNEY GENERAL.

##### *Style of cause after bill dismissed against one defendant.*

After a bill has been dismissed against one defendant, the style of cause as it originally was, should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular.

*Sed. Query.* Would it be irregular if the name was omitted.

*Mr. S. H. Blake* moved to dismiss.

*Mr. Moss* objected that the style of the cause was wrong, the bill having been dismissed against the defendant Medcalf, his name ought to have been omitted in the style of the cause.

*Mr. Blake* contended that the practice had been established by the course adopted by the profession since 1853. If the name was omitted, the Master would have no jurisdiction to tax the costs. The only case where it became necessary to omit the name of a defendant, was where the bill was amended by striking out a defendant.

*Mr. Moss* in reply questioned the fact of the practice of retaining the name being generally adopted. He had himself followed the other course. As to the proceedings in the Master's office, the order would enable the party to get his costs. The practice was analogous to that at law in a case of *non pros* where the defendant's name was not continued.

**THE SECRETARY.**—I overrule the objection. There are advantages in keeping the style of the cause as it originally stood in the bill. When the bill is amended and the name of a party struck out, there are generally amendments in

the body of the bill also. Here it would appear by the body of the bill that Medcalf is still a party, and yet his name would not be in the style of the cause. *Barry v. Crosskey* 2 J. & H. 136, shows that where a defendant demurs successfully, he has a right to have the name struck out of the style of the cause, but he must make an application for the purpose. From this it would appear to be, at all events, not irregular for the plaintiff to retain the name.

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#### BURROWS V. HAINY.

##### *Office copies of affidavits.*

If office copies of affidavits are demanded, it is imperative on the parties filing the affidavits, to furnish them; and the costs of any delay occasioned by his not doing so, falls on the party making such default.

On an injunction motion in Court, a question of practice arose as to service of office copies of affidavits.

*Mr. McLennan* moved for an enlargement on the grounds that he had not been served with copies of the affidavits in reply, and that defendants should pay the costs of the day. This was resisted as unusual, and, it was urged, that if plaintiff asked delay, it must be at his own expense, or at least without costs; and the question arose as to whether the order giving the forty-eight hours to serve office copies of affidavits, rendered it imperative on the party filing them to serve such copies.

*Mr. Spencer*, for defendant, argued that the only penalty for not serving the copies was, that the other side could get them from the Registrar, and, on taxation, would be allowed the expense of doing so, whatever order might be made as to costs generally, and that such was the English practice.

*Mr. McLennan, contra*, contended that the delay was occasioned by the defendant's default, and that he, therefore, ought to bear the costs.

THE CHANCELLOR took time to consider the question of costs, and held that the defendant ought to pay them. That

office copies of affidavits stood on the same footing as office copies of answers, with regard to which it was imperative to serve them when demanded, and the costs of any delay arising from not doing so, properly falls on the party neglecting to do so.

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### GRAHAM V. DAVIS.

*Proceedings in ignorance of plaintiff's death—Infants.*

The Solicitor of the plaintiff, in ignorance of the plaintiff's death, had, after that event, taken certain proceedings in the cause. On a motion to confirm these proceedings it was held that no order could be made except by consent.

This was a foreclosure against the infant heirs of a mortgagor, a decree had been made and a reference, and accounts taken. The plaintiff who had been residing in England, was found to have died whilst these proceedings were in progress: an order to revive was then taken out, and the present motion to confirm the proceedings taken after the death of the plaintiff made.

*Crooks, Kingsmill and Cattanach*, for plaintiff.

The following cases were cited, in the course of the argument.

*Lys v. Lee*, 17, Jur. 272, 607; *Houston v. Briscoe*, 7, W. R., 394; *Fallerton v. Martin*, 1 Drew, 238; *Jebb v. Tugwell*, 20 Beav. 461.

THE SECRETARY.—Of the cases cited, the only one which really bears upon the question is *Houston v. Briscoe*. In that case V.C. Kindersley made an order confirming the proceedings, there being no infants interested, and all parties being represented and consenting to any order that might be made.

In *Smith v. Horsfall*, 24 Beav. 381, one of several co-plaintiff's having died before decree, though the fact was

unknown, until the decree had been proceeded on before the Chief Clerk, the Master of the Rolls held, that the suit must be revived and a new decree obtained ; but when a motion was made to revive the suit, the representatives of the deceased plaintiff submitting to be bound by the proceedings, and the defendants not appearing, an order was made to revive the suit and prosecute the decree already made. Here there are infant defendants, and although their guardian does not object to an order confirming the proceedings, no consent to bind them can be given.

By refusing the motion the infants will have a longer time for redeeming, and that I must assume is for their benefit. I therefore refuse the application.

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#### RE WARD.

*Committee of lunatic—Receiver—Security from.*

The recognizance of the committee of a lunatic, or of a Receiver will not be deemed sufficient security under the statute.

On an application for the appointment of a committee to a lunatic, it was proposed that he enter into his own recognizance only,—or that he be appointed Receiver on his own recognizance.

THE SECRETARY.—The friends of the lunatic apply for the appointment of a committee, giving his own security only. This I think I cannot grant. The statute expressly require "two or more responsible persons as sureties." I cannot appoint a Receiver either, on his giving his own security only. This has been done in England, but only when all parties are *sui juris* and consent *Tylee v. Tylee*, 17, Beav. 583; 2 Dan. Practice (last edition), 1573.

*Blake, Kerr and Wells, Solicitors.*

## GRANGE V. BARBER.

*Right of plaintiff to costs where proceeds of sale not sufficient to pay prior incumbrancers.*

A bill for sale was filed by a *puisne* incumbrancer, and prior incumbrancers and mortgagees were made parties in the Master's office and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient to pay the first incumbrancer. An application on part of the plaintiff to have his costs of suit and of sale paid out of such proceeds, in preference to the first incumbrancer, was refused with costs.

The bill was for sale by a *puisne* incumbrancer. Hurd and others mortgagees and prior incumbrancers had been made parties in the Master's office, proved their claims but did not claim redemption. The priorities were settled by the Master. Hurd and others were found to be the first incumbrancers and their costs taxed to them. By the decree on further directions there was found due to Hurd and others for principal, interest, and costs, £159 6s., and the amount due the plaintiff and another subsequent incumbrancer; and these amounts were directed to be paid by a certain day, otherwise sale, and that the purchase money be paid into Court "and applied to pay the said incumbrances according to their priorities, as in the Master's report of the 2nd July, last set forth, any of the parties being at liberty to apply as occasion may require." Default was made in payment and a sale took place of a portion of the property, and the proceeds paid into Court, these proved insufficient to pay off the first incumbrancer.

*M. Cattanach*, on behalf of the plaintiff now applied that his costs of suit and of sale be paid out of the amount in Court, prior to the first incumbrancer, contending that the sale was for the benefit of all the incumbrancers, they having come into the Master's office and availed themselves of the benefit of the suit and of the sale, that the first incumbrancer not having insisted on redemption, had adopted the remedy the plaintiff had sought and treated the suit and the sale as of benefit and advantage to him, he cited *White v.*

*Peterson, Jacobs*, 402. *Kimbel v. Scrafton*, 13 Ves. 370. *Wright v. Kerby*, 23 Beav. 456. *Fair v. Chesterfield*, 21 Beav. 456.

THE CHANCELLOR.—In examining the above cases, it will be found that when the Court has ordered the plaintiff's costs of the suit, to be first paid out of the fund in Court, it has done so, either because the sale has been treated specially for the benefit of all parties who ought thereupon to contribute to the expense of it, or that the plaintiff has by his efforts secured for all, something which was of doubtful recovery and but for those efforts would not have been obtained, or where the sale has been an ordinary suit for the administration of an estate in which some privileged or secured debt has been proved. In this case, however, there is nothing special—nothing to take it out of the ordinary rule, the right of the first incumbrancer to have his lien on the estate first discharged.

The plaintiff not choosing to redeem him, files a bill for a sale, and makes him become a party to the suit in the Master's office and prove his claim there, that the property may be sold free from his charge upon it. He does so, and now it is ordered that, instead of having the money realized from the sale paid in discharge of so much of his debt, it shall *pro tanto* go to pay the plaintiff's costs. The plaintiff instituted the suit at his own risk and for his own purposes, not for the benefit of the other incumbrancers. It is an ordinary suit in which he was entitled to sale or foreclosure, the prior incumbrancer not objecting—why then should that prior incumbrancer lose his priority on the fund to any extent for costs or otherwise? I do not see why he should.—*Tipping v. Power*, 1 Hare 405; *Hepworth v. Heslop*, 3 Hare 485; *Wilde v. Lockhart*, 10 Beav. 320; *Aldridge v. Westbrooke*, 5 Beav. 188; *Mason v. Buff*, 2 M. & C. 448; *Warburton v. Wright*, 2 Sim. 543; *Upperton v. Harrison*, 7 Sim. 444; *Barnall v. Going*, 1 Moll. 528; *Egan v. Baldwin*, 1 Moll. 540; *Seton on Decrees*, 97.

I think, however, the question is concluded by the decree

on further directions, which, in the language quoted, directs how the fund is to be distributed.

The plaintiff should have obtained a special direction in the decree as to his costs, if he was entitled to priority in respect of them: *Barnes v. Baister*, 1 Y. & C. 491.

The application is refused with costs, unless both parties consent to an order for payment of money in Court to the first incumbrancer.

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#### SUTHERLAND v. ROGERS.

##### *Master's office—Service of warrant.*

A warrant requires two day's clear service.

A Master's certificate should follow as nearly as possible the accustomed form, where it does not it will be assumed that the Master means to report specially.

*Mr. Crickmore*, for the plaintiff, moved for an order to commit two of the defendants for not bringing into the Master's office at Barrie, the engrossed copy of the conveyance of the lands and premises directed to be conveyed, the draft of which had been settled by the said Master.

In support of the motion were produced the warrant to bring in such engrossment and the certificate of the Master, that such engrossment had not been brought in; the warrant was returnable on the 4th of October, and by the admission of service thereon, appeared to have been served on the 2nd. The certificate of the Master ran as follows:—"I certify that on the first day of October instant, I issued a warrant in this cause, returnable on Friday, the fourth day of October instant, at eleven of the clock in the forenoon, at my chambers, on Owen Street, in the Town of Barrie, when the defendants George Barnard and Benjamin Barnard were to bring in an engrossed copy of the conveyance of the land and premises in question, in this cause, the draft of which was settled by me on the 17th day of June last, service of which

warrant as appears by the endorsement thereon, was admitted on the second day of October instant, by Charles J. Carroll, the Solicitor for the said defendants, and on the said 4th day of October instant, pursuant to the said warrant I was attended by the Solicitor for the said plaintiff, no one appearing on behalf of the said defendants, and the engrossed copy of said conveyance has not been brought into my office, as directed by the said warrant."

THE SECRETARY.—The plaintiff moves to commit two of the defendants for not bringing into the office of the Master at Barrie, the engrossment of a conveyance in obedience to the Master's warrant. The Master's certificate of their default states that he issued a warrant for that purpose, returnable on the fourth day of October; that on that day the warrant, with an admission of service from the defendant's Solicitor, dated the 2nd day of October, was filed in his office ; and that the defendants have not brought in any engrossment of the conveyance. I do not think I can grant the order asked for. A warrant requires two days' clear service. (Bennett's Master's Office, 7th Ed. 1836.) The authority cited for one day's service being sufficient, can apply only to a warrant "to consider the decree," one day's service of which was always sufficient. The Master may, perhaps, have power to shorten the time, but he does not certify that he did so in the present case ; and his certificate not being in the usual form, I assume he did not intend to decide that the service of the warrant was sufficient, but simply stated the facts, leaving the Court to judge of its sufficiency or insufficiency. If he did consider the service sufficient, the certificate should have followed the usual form (Bennett's Master's Office, app. 30.) It is greatly to be regretted that the long accustomed forms are not followed more strictly. By adhering to these forms great inconvenience and expense would often be avoided.

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## BURKE V. PYNE.

*Receiver—Infants—Setting up defence not pleaded by ancestor.*

Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches.

In a suit on a mortgage, the decree directed a sale in the event of default in payment; default was made, and an attempted sale proved abortive for want of bidders. The usual order directing a subsequent account, and in default foreclosure, was then made. An application was afterwards made and granted for an extension of the time for payment. Before the expiration of the extended time the defendant died. The suit was revived against his widow and children, and the children being minors a guardian *ad litem* appointed.

Default was made in the payment of the amount found due by the subsequent report, although the time for payment had been extended by agreement.

*Mr. S. H. Blake* now moved on notice for a final order of foreclosure against all the defendants, all having made default, the bill had been taken *pro confesso* against the defendants named in the bill. He contended that the plaintiffs were unquestionably entitled to the order as against all the defendants except those added by the order of revivor and as to these, they stood in the same position as their ancestor, and he would have had no better or greater rights than the present defendants, (other than the infants) having, before the order to revive, himself made default; and the plaintiff was now entitled to an order of foreclosure against all.

*Mr. Hector Cameron*, contra, urged that the widow claimed a portion of the property as her separate estate, and that the interests of the infant defendants ought to be considered. That they ought to be let in to answer and set up the best defence they could make, or that at any rate they should be allowed to redeem and the time for payment be extended.

THE SECRETARY.—The infants in this suit stand in no better position than their ancestor, the deceased defendant, I allowed the bill to be taken *pro confesso* against him. Further time has been asked for by him in common with the other defendants. The widow had known her rights, if any, for years; the suit had been pending for some years; the plaintiffs had been lenient, and afforded the defendants every opportunity of redeeming: unless actual fraud or mistake were clearly proved, it is too late now to set up merits. At all events the deceased defendant has been guilty of such gross laches that his representatives cannot be afforded any relief of the description asked. I grant the final order of foreclosure.

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#### BENNETT v. SPRAGUE.

*Substituting new next friend.—Security for costs.*

Where it becomes necessary to substitute a new next friend, the motion for the appointment should be on notice and an order taken on *præcipe* is irregular. An order so taken was set aside with costs on the grounds of irregularity, and without going into the question of the solvency of the party appointed.

An order was obtained on behalf of one of the defendants, directing that the plaintiff, a married woman, should appoint a new next friend, in the stead of the next friend named in the bill of complaint, within a limited time, otherwise the bill was to be dismissed, with costs, as against the defendant.

The plaintiff accordingly took out an order on *præcipe*, appointing one L. B. J. as such new next friend, filing a consent by the said L. B. J. to the appointment. Neither the consent nor the order specified the place of abode or the address and the occupation or description of L. B. J.

*Mr. Moss*, moved, on notice for an order, that all proceedings in the suit be stayed until the said L. B. J should give security for the defendant's costs, or for an order setting aside the order appointing L. B. J. as next friend for irre-

gularity, on the ground that the said order was issued on *præcipe*, whereas it should have been granted only upon a special application after notice to the defendants. As to security for costs, he contended that the next friend was to be considered in the same position as if he had been the next friend originally named in the bill of complaint, and if the abode and description of the next friend is not stated in the bill of complaint, any defendant may move for security for costs (*Daniels Chy. Prac.* 335). The defendants have no means of ascertaining whether or not the next friend is a person of substance. With respect to the objection on the ground of irregularity, the practice is established in England that, after appearance, if the plaintiff wishes to remove a next friend and substitute another, she must make a special application for that purpose, and the same practice has been recognised in this country after answer filed. The object of making a special application necessary is to enable any defendant to satisfy himself that the proposed new next friend is a person of substance, and to have any conditions as to security for past and future costs imposed that the court thought proper. He cited *Braithwaite's Practice*, p. 558, and *Eastman v. Eastman* 1 *Cooper's Cham. Rep.* 183.

*Mr. Hodgins*, for the plaintiff, argued that no evidence of the want of solvency on the part of the proposed new next friend had been shewn: that the order substituting a new next friend only required a special application when the plaintiff herself was desirous of making the change, *Drinan v. Mannix*, 3 *Dru. and War.* 154. Here an order having been obtained by a defendant directing the plaintiff to substitute a new next friend, the order appointing L. B. J. could not be deemed to be made upon the plaintiff's application.

*Mr. Moss*, in reply. The plaintiff has given the defendants no information as to the proposed new next friend, upon which they could make inquiries as to his position and solvency. If his address and description had been set out in the order, the defendants might have been obliged to furnish evidence of want of solvency if they sought security for costs, but those particulars not having been furnished, the burden of

proof was shifted to the plaintiff, and it was for her to shew that the proposed next friend was a person of substance, or give security. No evidence of this kind had been offered. The case of *Drinan v. Mannix*, cited by Mr. Hodgins, was distinguishable. In that case the next friend named in the bill would be still eligible to act provided security for costs were given, but in the present case the plaintiff was directed to appoint a new next friend, because the one named in the bill being also a defendant was ineligible under any circumstances.

THE SECRETARY discharged the order for the appointment of the new next friend on the ground that the same was improperly granted *ex parte*, with costs to the defendant of the present application.

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#### IN RE THOMPSON—BIGGAR v. DICKSON.

##### *Purchaser at sale under order of Court—Interest.*

A purchaser at a sale under order of this Court was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he was in no way responsible, such delay however not being caused by any fault of the vendors, the condition of sale stipulating for the payment of interest *from the day of sale*.

Semblé, in the absence of such stipulation in the conditions of sale, the Court would relieve the purchaser from the payment of interest where the delay was not of his causing. Such a stipulation in the conditions of a sale is not to be approved of.

*Mr. S. H. Blake* applied on behalf of several purchasers at a sale of the premises in this matter, to be relieved from the payment of interest on their purchase money, long delay having taken place in making a title. He contended that if under the conditions of sale, the purchasers were bound to pay interest, they ought on the other hand, as a matter of law, to be equally entitled to compensation for not getting their title sooner which might perhaps have occasioned them much loss, and if so, one claim should stand against the

other, and the purchaser with great fairness be relieved from the payment of interest. He cited *Fry on Specific Performance*, 3; *Monk v. Huskisson*, 4 Rus. 121.

*Mr. Fenton*, contra. The vendors are entitled to interest from the day of sale as stipulated in the contract, notwithstanding the delay in making out title, as it arose simply from the state of the title itself, and without any neglect or default on the part of the vendors which would exempt the purchasers from paying interest. See *Vickers v. Hand*, cited in Sudgen on Vendors, 14th ed. 628, 637, and *Lord Palmerston v. Turner*, 33 Beav. 524.

The purchasers are not entitled to compensation. When the contract is made the vendor on the one hand becomes a trustee for the purchaser of the estate sold, and therefore accountable to him for its profits after that time; and the purchaser on the other hand becomes a trustee for the vendor of the purchase money, and therefore accountable to him for interest upon it from the time stipulated by the contract. Sudgen, 14 ed. 185; *Harford v. Parrier*, 1 Madd. 538; *Ackland v. Gaisford*, 2 Madd. 32; *Robertson v. Skelton*, 12 Beav. 260.

The delay in this case was occasioned by a reference to the referee under the Act for Quieting Titles at the instance of the purchasers themselves, and this took longer to complete than any ordinary reference to the Master, but the title was made indefeasible and without any cost to the purchaser—advantages of which the purchasers have had the benefit, and they ought not therefore to object to pay the interest that is, expressly by the contract, to be computed from the day of sale.

*Mr. Blake*, in reply. The inquiry into title before the referee was not made at the instance of the purchasers. It was as much for the benefit of the estate as that of the purchaser. The estate could not claim to perfect their title at the expense of the purchaser, when they ought to have been prepared at once to show an indefeasible title.

**MOWAT, V. C.**—In July, 1868, the testator's farm was sold in 87 parcels under the decree of this Court, and the

purchasers were numerous. On looking into the title after the sale, it was discovered that there were several defects in it which some time would be required to remove, and that the expense of a separate mortgage by every purchaser would be a heavy burden to the purchasers, and an enormous expense to the estate. It was therefore determined, with the consent of all parties, to prove the title and give deeds to the purchasers under the Act for Quieting Titles. This cause gave the purchasers a more satisfactory title than they could possibly have had otherwise, and saved great expense to both vendors and purchasers, but it did not prevent considerable delay in making out the title, so that it was two years after the sale before the conveyances could be obtained. The property yielded no rent in the meantime, and a motion was made by one of the purchasers that he should be relieved from liability for interest during this period. Other purchasers are awaiting my decision upon this point before completing their purchases. By the conditions of sale, ten per cent. of the purchase money was to be paid at the time of sale, ten per cent. more, without interest, was to be paid within a month after the sale, and the residue was to be paid in four equal annual instalments, *with interest from the day of sale*, to be secured by a mortgage; the mortgage to be given at the time of the delivery of the conveyances to the purchasers, who were thereupon to be let into possession. I have looked into the authorities which were cited, all of them, except *Lord Palmerston v. Turner*, 33 Beav. 524, are with other cases collected in Lord St. Leonard's book on Vendors and Purchasers, 14 ed., ch. 17, sec. 1 p. 627 *et seq.* I think that the late cases shew clearly that the purchasers are bound by the stipulation as to interest on which they bought, it being admitted that the delay arose from the state of the title, and not from any default or misconduct of the vendors. At the same time, I take this occasion to say that a condition in this form is not in the case of Chancery sales to be approved of. If purchasers at a Chancery sale have to take into account that, though they are secure of a good title, it may, as in the present case, take two years to get their deeds and the

possession of their property, the tendency will be to depreciate by so much the prices obtained at all Chancery sales, for bidders cannot know the state of the title before hand. On the other hand, vendors ought to know the condition of their own title before selling, and it is no hardship on them that the interest should run from the time they shew a good title, instead of being made to run from the day of sale. But as the condition was adopted in the present case, and the purchasers bought, as I must assume, with the full knowledge of it, the authorities forbid my relieving them from its consequences.

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**VANWORMER V. HARDING.***Costs.*

A purchaser whose vendor had died and who had paid his purchase money partly to the vendor in his life time, and the balance to his administrator, brought an action to recover back the purchase money, when a bill for an injunction was filed, a good title was subsequently shewn; the purchaser, the defendant in the injunction suit, was ordered to pay the costs down to the hearing of the cause.

*Mr. S. H. Blake*, moved for decree.

*Mr. Hamilton*, for the defendant.

A question of costs arose, and *Weihe v. Ferris*, 10 Grant, 98, *Winters v. Sutton*, 12 Grant, 118, were referred to.

It appeared that the S. H. Parke since deceased, had sold certain property to the defendant, George Harding. Parke died, leaving the plaintiffs, his widow and children. That letters of administration were granted to certain of the plaintiffs. During the life of Parke, Harding paid part of the purchase money, the remainder not being due, and since had paid the balance. That several of the defendants were infants, and no conveyance had consequently been made, although the adult plaintiff had offered to convey and to covenant that the infants would convey when of age.

Harding, however, brought an action to recover back the

purchase money paid, and then the present bill was filed for an injunction, restraining the proceedings at law.

It was admitted on the part of the defendant, Harding, that a good title had been shewn since bill and answer were filed, but he claimed that if he had to accept the title, the costs of this suit, and at law, should be paid by the plaintiff.

*Mr. Hamilton* cited *Morgan v. Davy* on costs, pp. 181, 2, 3.

**VANKOUGHNET, C.**—I think that Harding should pay the costs of so much of the suit as has been occasioned by the necessity for an injunction. Indeed I think he should pay costs down to and inclusive of the hearing. The suit was rendered necessary by his having brought the action at law. He assumed a hostile attitude, which plaintiff had to come here to repress. He might have remained quiet till the infants came of age, or sought for a title through this Court. He did neither, but treated the equity as at an end, and this decree is necessary to give effect to it against his action in the matter.

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#### MALCOLM V., MALCOLM.

##### *Practice—Demurrer.*

Where a demurrer is filed for want of parties as well as for want of equity, the question of parties must be disposed of, before the demurrer for want of equity can be argued.

This was a demurrer for want of parties.

*Mr. S. H. Blake*, for the demurrer.

*Mr. E. Wood*, contra.

In support of the demurrer the following cases and authorities were cited : Story Eq. Pl. sec. 72, 76, a. c. note 2, 97, 98, 107, 126; Con. Stat. U. C., p. 737, sec. 30.

The bill was filed on behalf of "a majority of the assessed ratepayers," not on behalf of all.

*Mr. Wood* admitted that the bill was not properly framed but contended that there was also a general demurrer for want of equity, contained in the demurrer filed under the allegation "that the bill does not disclose a case whereon any relief prayed may be had against these defendants," and that the defendant does not now urge or sustain that position.

*Mr. Blake*, in reply, pointed out that the allegation referred to was not a specific ground of demurrer, for it did not allege a want of equity, and that it must be coupled and read with the succeeding allegation as to want of parties. He cited *Mills v. Campbell*, 2. Y. & C. 389; *Westbrooke v. Attorney General*, 11 Grant, 264; *Paine v. Chapman* 6 Grant, 338.

VANKOUGHNET C.—When a demurrer is filed for want of parties, and also for want of equity, I think that the plaintiff should put his bill right as to parties before he can insist on having argued the demurrer for want of equity. To argue the demurrer for want of equity in the absence of the proper parties to the suit seems contrary to all principle. The Court might as well proceed to a hearing of the cause in the face of such an objection, when it is plain at the outset. In many or most cases, such a course would be futile as the absent parties could in no way be bound. Here the plaintiff admits that his bill is defective in parties, and that he knew it was so when he set down the demurrer; but he insists, nevertheless, on having the question of the whole equity argued. I think I must stop him here, and give him leave to amend his bill on payment of costs. Sometimes the argument has taken place, subject to the objection of parties, and the Court has in such cases apportioned the costs; but here the objection is too obvious to require delay for consideration.

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## DEAN V. LAMPREY.

*29 and 30 Vic. chap. 24—Security for costs.*

To bring a case within the Statute, 29 and 30 Vic. chap. 24, requiring security for costs to be given where another action for same cause is pending, it must be clearly shewn the causes of action are identically the same, and not merely growing out of the same transaction. And, *Quere*, does the Act apply at all to this Court, or to a case where one action is at law and the other in this Court.

A motion was made by Mr. Bain on the part of the defendant on notice for security of costs, on the ground that the plaintiff was, at the time of filing the bill in the cause, prosecuting an action in Her Majesty's Court of Common Pleas, against the same defendant, in respect of the same matters, and for the same cause of action, the motion was under the Act of 1866, 29 and 30 Vic., chap. 42, which provides that no addition to any cases in which a defendant in any suit is now entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any suit or proceeding in which it is made to appear satisfactorily to the Court in which such suit or proceeding has been instituted or taken, or to any Judge in Chambers, that the plaintiff has brought a former suit or proceeding for the same cause which is pending either in Upper Canada or any other country." The defendant produced the declaration in the suit at law, and the bill filed in this Court, to establish that both suits were for the same cause of action. It appeared that the defendant had entered into an agreement to lease "on shares" to the plaintiff, certain lands in the Township of Goderich, and to find the plaintiff "all seed that should be wanted on the said lot;" that defendant, it was alleged, failed to furnish such seed, and plaintiff brought an action against him in the Court of Common Pleas for damages for breach of his covenant. The plaintiff also subsequently and during the pending of the suit at law, filed a bill for a specific performance of the agreement to lease, and to restrain defendant from ejecting plaintiff, who had gone into possession. In this suit the present motion was made, calling on the plaintiff to give security for costs.

For the defendant it was contended that the suits were virtually for the same cause of action, and that the case came within the Statute. That the defendant would be entitled to an order calling on plaintiff to elect where to proceed, and was therefore under the Statute entitled to the order asked for. He cited *Prothero v. Phelps*, 25 L. J. Chy. 105; *Tennig v. Humphrey*, 4 Beav. 1.

*Mr. C. W. Patterson*, for the plaintiff, pointed out that the two suits, although growing out of the same agreement were altogether independent of each other, that the plaintiff might fail in the action for damages and yet be entitled to the specific performance of the agreement to lease, and the objects of the suits were totally different. He referred to *Elliot v. Pinkerton*, 4 Prac. Rep. 86.

THE SECRETARY considered the defendant had not shewn a case within the Statute, and refused the motion.

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#### WHITE v. CHURCH.

*Pro confesso order against a married woman.*

An order will not be made to take a bill *pro confesso* against a married woman without her having had an opportunity to answer separately.

A motion was made on part of the plaintiff for the allowance of the service on a married woman, and an order to take the bill *pro confesso* or an order for her to answer separately. Such married woman was living apart from her husband.

*Crooks, Kingsmill & Cattanach*, Solicitors for the plaintiff.

THE SECRETARY.—I cannot make an order *pro confesso* against the married woman, without her having an opportunity of answering separately under an order obtained for that purpose. *Bunyan v. Mortimer*, 6 Mad. 278, seems to shew that it is necessary even where the husband has absconded, and the wife is served in the first instance, as in this case.

## CHAMBERLAIN V. McDONALD.

*Demurrer.*

The giving time to answer, does not authorize the defendant to demur after the time for answering has expired.

*Mr. Crickmore* moved to take demurrer off the files for irregularity on the ground that the same had been filed after the time for answering had expired, and that the demurrer was not endorsed with the name of the agent filing the same. Time had been given to answer on the application of the defendant's Solicitor. He cited *Boultby v. Cameron*, 2 Cham. Rep. 41. The demurrer was a joint demurrer by the defendants, D. M. McDonald and Jane McDonald.

*Mr. D. M. McDonald*, in person, urged that the application for time to answer referred only to his own answer and not to that of Jane McDonald.

**THE SECRETARY.**—The defendant McDonald asked for time to answer. It is not necessary to decide whether he asked it for Mrs. McDonald or not. He is not only a defendant, but he is also her Solicitor, and they have put in a joint demurrer. It should be taken off the files with costs

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## DREWRY V. O'NEAL.

*Office-copy bill.*

The endorsement on an office-copy bill must specify distinctly which relief the plaintiff seeks, whether sale or foreclosure.

*Mr. Holmsted* moved to set aside service of a bill of complaint, on the ground that the endorsement did not specify whether a sale or a foreclosure of the mortgaged premises was sought by the bill.

No one appeared for the plaintiff.

**THE SECRETARY.**—I think an order should go, setting aside the service with costs.

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## GORDON V. JOHNSON.

*Swearing answer.*

The fact that an answer had been sworn before a Commissioner who had been formerly concerned as Solicitor in the cause, was not held to be ground for taking the answer off the files; but where an answer had been irregularly transmitted, it was ordered to be re-sworn within a given time, with costs against the defendants.

*Mr. Bain*, for the plaintiff, moved for an order to take the answer, filed in this cause, off the files, on the following grounds :

1. That the same is sworn before the Solicitor or agent of the defendant.
2. That the said answer contains numerous erasures and interlineations.
3. That the name of the agent filing the same is not endorsed.
4. That the messenger who brought the same to the Registrar's office was not sworn.
5. That such messenger did not receive the answer from the Commissioner before whom it was sworn.

In support of the motion, Mr. Bain read depositions of Mr. Haldane, before whom the answer had been sworn. It appeared that there had been a motion for injunction made in the cause, on which motion Mr. Chadwick had appeared as the agent of Mr. Haldane. No order had been taken out, changing the Solicitor, although Mr. Haldane had ceased to act, it was urged that costs were still due to him, and therefore he was not competent to administer the oath. As to the interlineations, the Order of 1851 was referred to; also, Orders of February, 1865, and the following cases were cited:—*Gill v. Gibbard*, 9 Ha. app. 16; *Attorney General v. Hudson*, Ib. 63; Smith's Pr. 475; *Attorney General v. Mayor of Fowey*, 3 Swans 184. To the 3rd ground the absence of the oath of the messenger. Order 43, 1, 5 was referred to.

*Mr. Blake*, to the first objection, contended that the Commissioner, before whom the answer was sworn, being Solicitor in the cause, was not ground for taking the answer off

the files. Mr. Haldane had been Solicitor at an early stage of the cause ; but was not so at the time of the swearing. He cited *Foster v. Harvey*, 11 W. R. 899 ; *Hogzn's case*, 3 Atk. 812. Mr. Haldane was not the Solicitor on the record. As to the second ground, that of interlineations and erasures, he contended that there was no order of Court here, as in England, as to erasures in answers ; that the objection, if tenable, should have been taken on the motion for leave to answer, such a motion having been made in this cause and the answer produced. A copy of the answer had been demanded, which was a waiver of any irregularity. *Sur v. Benyon*, Forrest R. 22, &c. After such motion, the Secretary should have sealed up the answer and sent it to the Registrar ; or the Solicitor should have sent it to the Commissioner, which he did.

*Mr. Bain*, in reply. Until the answer is filed there is no defendant's Solicitor on the record. *Foster v. Harvey*, therefore, does not apply. The only papers filed were some affidavits, on which Mr. Haldane's name appears as Solicitor. On the motion to set aside the order *pro confesso*, the merits were not gone into ; the order then was set aside on technical grounds solely. As to the demand of office-copy answer, which was urged as a waiver, such copy was demanded for the purposes of the motion for leave to answer, and not as in the cause. If he succeeded on any one of these grounds, he was entitled to the costs of this motion. There had evidently been very great irregularity in the filing of the answer, and for anything that appeared, the erasures and interlineations might have been made while the answer was in possession of the defendant's Solicitor. It appears that the answer was opened, and the affidavits on the other side do not negative the making the erasures and interlineations.

THE SECRETARY.—*Foster v. Harvey* seems authority for holding that it was not irregular to swear the answer before Mr. Haldane. I do not think the mere fact that the erasures were not initialed would be a ground for taking the answer

off the files, had it been regularly transmitted by the Commissioner to the Deputy Registrar's office. It was not so sent, however, and I think the proper order will be for the defendant to attend at the Deputy Registrar's office, within a limited time, and reswear the answer, paying the costs of this motion.

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THE UPPER CANADA MINING COMPANY V. THE ATTORNEY GENERAL.

*Dismissing bill.*

Where a notice to dismiss was made by certain defendants who had been made parties by amendment at a comparatively recent date, delay having occurred previously in the conduct of the cause, they were not permitted to shew such delay as a ground of dismissal, and an order to dismiss made by the Secretary, whose attention had not been called to the fact of the parties moving having become parties at a recent period; was reversed, but with costs against the plaintiffs, they having been guilty of delay.

This was an appeal against two orders of the Secretary, one dismissing the bill, and the other refusing leave to amend.

*Mr. Moss* for the plaintiff, who appeals.

*Mr. S. H. Blake* and *D. Macdonald*, contra.

*Mr. Moss* contended that the plaintiff had shewn sufficient diligence, and where delay had occurred, reasonable excuse for it; and that under the circumstances the Court would not have dismissed the bill. The venue was at Ottawa, and there was no laches in not bringing the case down to hearing at the May sittings there. Diligence was shewn up to the 9th of May, the sittings commenced on the 12th. In June, after waiting for some time for the opinion of counsel, the plaintiffs were advised to amend by adding a party as defendant; but on applying for leave to amend it, was on the 28th June refused on technical grounds; leave was given to serve notice for the following day, which was done; but the defendant's Solicitor did not appear, and a new notice was given for the first day after vacation; the matter was further postponed, and on the 15th September, the order

refusing leave to amend was made—the Solicitor for the plaintiffs was then changed, and since then every effort to get down to hearing had been made. That it was true some slips in practice had been made in the effort to get leave to amend but these should not be considered against the plaintiff on the question of dismissing the bill, and the Secretary ought to have given the leave to amend. He urged that the defendants were not entitled to an order to dismiss, because although not actually in contempt themselves, they appeared by the same Solicitor as other defendants who were in contempt. *Rice v. George*, 2 Cham. Rep. 74; *Winthrop v. Murray*, 7 Hare, 150. Macdougall and Blackburn, were in contempt for not having appeared to be examined on their answers. Referring again to the alleged laches, he pointed out that the last of the answers was only filed on the 10th of May, the sittings commencing on the 12th, and that they could not prepare for the Fall sittings in consequence of the refusal of leave to amend.

*Mr. S. H. Blake*, read the certificate of the Registrar, on which the order to dismiss was granted, from which it appeared that the bill was filed 11th November, 1865, amended 31st May, 1866, reamended November, 1866. No order to produce had been taken out. He contended that great delay had clearly taken place, and no reasonable grounds were shewn for it. He questioned the position of plaintiffs, that due diligence was shewn up to the 9th May. He cited *Mulholland v. Brent*, 2 Cham. Rep. 31. The delay in coming in of some of the answers does not help the plaintiff, for the delay on plaintiff's part subsequent to the filing of the answers, was sufficient to justify the order to dismiss. He commented on *Wintross v. Murray*, cited by the other side, pointing out that in that case the delay was not shewn to be great or unreasonable. He also referred to Taylor's Orders, p. 64, and the language of Sir John Stuart in *Hancock v. Robillon*, 5 Jurist, N. S. 1199.

*Mr. Moss*.—The defendants now moving were only brought into the suit by being made parties by amendment on the 31st October, 1866; and they were not in a condition to

complain of any want of diligence on the part of the plaintiff which had occurred previous to that time. The defendants had themselves been very dilatory in answering. McDougall had been served 1st November, 1866; Langlois, 15th November; Sheppard, in January following; Wallace Mining Company, in February; Sargent, in February. The Wallace Mining Company answered on 13th April; Sheppard, 21st March; Sargent, 11th May, 1867.

VANKOUGHNET, C.—The application to dismiss was made by certain defendants who were introduced into the suit by amendment for the first time in October, 1866. Two of them resided in a foreign country, the United States, and were served there, and their answers were respectively put in on the 13th April and the 11th May, 1867. No complaint is made of want of diligence in serving these defendants after they were made parties. The venue is laid at Ottawa, and the Spring sittings were commenced on the 12th May. An application to amend by adding a party who was described in the answer of Langlois as the *cestui qui trust* of the property which he was supposed to hold, was refused in June for irregularity, and subsequently in July and August, on the ground that it was made too late.

My brother *Mowat* tells me that when in conference with the Secretary as to the propriety of dismissing the bill, it was not brought to his notice that the parties moving to dismiss had only become parties at a recent period.

The plaintiff could not have gone down at the Spring sittings at Ottawa, as Sargent's answer came in on the 11th May. There was a delay by the plaintiff in not applying to amend after this till June, the necessity for amending during this interval, being, it is sworn, under consideration of counsel. From that time the plaintiffs struggled to get on, but were unsuccessful. I think, the irregularity got over, that the application to amend, so far as these defendants now moving were concerned, should have been granted, as their answers were late in coming in. The distinction between their position and that of the original defendant does

not appear to have been adverted to. I therefore, will restore the bill as against them or rather reverse the order to dismiss, the plaintiffs however paying the costs.

When a plaintiff has been impeded by difficulties, these form no longer an excuse when the road is made clear, and I must say there was considerable delay after the last answer came in, in moving to amend. The longer a plaintiff has been delayed by difficulties even though not of his own creation, the more speedy should be his movements when they are removed.

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#### GORDON v. JOHNSON.

##### *Pro confesso note.*

A note *pro confesso* was set aside where the affidavit of service of office-copy bill was shewn to be imperfect and insufficient.

*Mr. S. H. Blake*, moved to discharge note *pro confesso*. He objected to the note standing, on the grounds of the irregularity and insufficiency of the affidavit of service of bill. There was nothing in the affidavit to shew when the bill was filed, nor any proof of the copy being authenticated as an office-copy of the bill filed. There was also an error in the endorsement on the bill in this—that after the word “foreclosed” the words “or sold” were introduced, whereas the defendant was entitled to be informed by the endorsement whether a sale or foreclosure was sought by the bill. A further defect in the affidavit was, that the year in which the service was made was omitted, and also, that it stated the office-copy to be authenticated by the Registrar of the Court, whereas it was authenticated by the Deputy Registrar at Goderich.

*Mr. J. Bain*, contra, urged that the Deputy Registrar had to be satisfied that the service was made, and must have been so satisfied before he entered the *pro confesso* note, and that he was the proper person whom the orders directed

should form an opinion on the matter, and that the note could not be vacated on the grounds of irregularity in the affidavit of service.

**THE SECRETARY.**—I set aside note *pro confesso* with costs on the ground of irregularity in the affidavit.

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#### THOMPSON v. THOMPSON.

##### *Dower.*

Where a married woman had signed a deed which, however, contained no bar of dower, the Secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infants defendants who were interested in having the dower barred. Such relief would be properly the subject of a bill.

**Mr. G. Murray** moved for decree against the infant defendants, and a decree *pro confesso* against the doweress.

There appeared to be due for principal on the mortgage in question the sum of \$2,000, and a large arrear of interest; the mortgage contained no bar of dower, but it had been signed by the wife.

**Mr. Jones**, for the infants. It would be the more beneficial for the infants that the dower should be barred; the allegation in the bill was that the dower was barred, and he asked that an enquiry might be directed to ascertain if dower was barred or not.

The plaintiff asked for a sale.

**THE SECRETARY.**—I cannot, I think, make a declaration that the widow of the mortgagor is not entitled to dower, or a direction for a reference to the Master to inquire whether by signing the deed, she intended to bar her dower. The plaintiff may; perhaps, if he can, prove that she contracted and agreed to bar her dower, be entitled to a decree for the rectification of the mortgage, but he must frame his bill so as to set up that case. If he did, he could not obtain a decree in Chambers as against the infants.

## FISKEN v. WRIDE.

*Writ of sequestration.*

A writ of sequestration cannot properly be issued on *præcipe*. Before such writs can be regularly issued, the order for the payment of the money must be served, and an affidavit of such service and of the non-payment filed. A writ is issued on *præcipe* was set aside, but without costs.

*Mr. Blain* moved to set aside a writ of sequestration, on the following grounds:—

That before writ issued, an order should have been taken out for the payment of the money and served, and an affidavit filed of non-compliance with such order. In this case no evidence of service or of substitutional service was given. This writ had been issued on the return of a *fi. fa. nulla bona*. A writ of sequestration could only issue after a contempt, and the Legislature now said that non-payment of money was not a contempt. It could only issue in cases where formerly a writ of attachment could issue; and could not properly, and ought not to issue as a matter of course, on *præcipe*. The Registrar should not be called on to determine whether a party was in contempt or not. He referred to Daniel's Pr. 1258; Taylor's Orders, 182. He contended, also, that from Orders, page 261, sec. 13; 263, sec. 21, it was intended that the process for non-payment of money should be by *fi. fa.*; that the process for any other contempt, or other disobedience of order—non-payment being no longer contempt—should be by attachment and sequestration. The wording of the writ shews it was intended to issue in case of contempt; and non-payment is not contempt.

*Mr. Hodgins*, contra, admitted the facts under which writ issued, but contended that it was perfectly regular: (see Orders, p. 181, sec. 2), and had always been the practice. Where property was seized under an attachment, no order was necessary before sequestration issued, under section 12 of Act. A return of *nulla bona* to a *fi. fa.* was equivalent to a return of *cepe corpus* to an attachment, in which case a writ

issued at once without any affidavit and on the Sheriff's return only. Non-payment of money is contempt, in that it is disobedience to the order of the Court. Under the old practice, the Registrar's Clerk could issue a writ of assistance, which was a more powerful writ than one for sequestration. He also urged that the present motion came too late. The order was made in June, 1867; service admitted in July; writ issued, 21st September; December 7, notice of motion was served to enforce proceedings under sequestration, and motion was made on 11th December. He cited *St. Johns v. Phelps*, 12 Beav. 607.

*Mr. Blain*, in reply. It is not necessary that he should shew that no order was made, and no affidavit filed. The allegation in his notice was sufficient to put the party issuing writ to proof of its regularity. In the Courts of Common Law non-payment of costs is not treated as a contempt. The former practice required personal service of order endorsed according to the General Orders; then attachment; then sequestration. Attachment is now dispensed with, if party is out of the jurisdiction; but the other steps are necessary, and proof of their being taken should be given.

**THE SECRETARY.**—Without deciding whether a writ of sequestration can or cannot now be issued for non-payment of money after a return of *nulla bona* to a *fi. fa.*, I think the writ here is irregular. It is expressed to be till the plaintiff "clear his contempt;" and the Court has again and again decided that non-payment of money is not contempt. I think the writ should be set aside; but as many such writs have been issued, and the defendant may have been misled, the order should be without costs.

*Mr. Hodgins* moved, by way of appeal, to set aside the order of the Secretary, contending that the words, "until he shall clear his contempt," which are in the form of the writ of sequestration, were in fact mere surplusage, and might with propriety be omitted and rejected altogether. That the Court

has alway possessed and exercised the jurisdiction to issue writs of sequestration, and it has been the practice for years, and ever since 22 Vic. ch. 23, was passed. That the Orders of Court contemplate the issuing of such writs, and provide rules as to the practice: Taylor's Orders, 182.

*Mr. Blain*, contra, took the same grounds as before the Secretary, and cited Dan. Pr. Perkins's ed. 1233.

VANKOUGHNET, C.—Whether the Court can or not without personal order, made since the Statute of 1859, issue a writ of sequestration for non-payment of money, or whether the writ, as issued, is irregular, because it directs the sequestrator to hold the property till the defendant clears his contempt—the non-payment of money being no longer a contempt—I think that a writ of sequestration cannot issue upon a *præcipe* as does a *fi fa*. This writ is of a higher and more important class than a mere *fi fa*: a writ which, formerly, the Court only permitted to issue after due notice, and the standing out of the defaulting party against the orders and processes of contempt.

The Legislature has abolished the process of contempt, but they have not declared that writs of sequestration shall issue as a matter of course, and I think that before one can issue, the order for the payment of money must be served, and an affidavit thereof, and of the non-compliance with it filed.

I doubt if the Registrar has any power now, in the absence of an order to that effect, to issue a writ upon *præcipe*. He was authorized under the General Orders, to issue a writ without further order, on the return by the Sheriff to the writ of attachment, that he had the party in custody; but he has no authority, that I see, to issue the writ in any other case.

I think Mr. Blain's affidavit was sufficient to call upon the opposite party to show that the Order of the Court, for disobedience of which the writ had issued, was served, and the affidavit of such service, and of non-compliance therewith filed. And a reference to the files of the Court show that no such papers are there.

## RE BEUCHER, BARKER, AND STREET.

*Taxation.*

Where an order for taxation had been obtained *ex parte* at the instance of one of two clients who had jointly retained the Solicitors, whose bill it was sought to tax, such order was set aside as irregularly obtained.

*Mr. Roaf*, Q. C., moved to discharge an order for the taxation of costs.

It appeared that the order complained of had been obtained on *præcipe*, at the instance of one client only, the retainer of the Solicitors having been by two. The client moving to tax, had been notified of the intention of the Solicitors to sue.

No one appeared to oppose the present motion.

**THE SECRETARY.**—I think this order should be discharged. It was obtained by one of two clients who had employed the Solicitors on a joint retainer. The wording of the English Statute is the same as our own, “that a bill may be taxed upon the application of the party chargeable by such bill within such month,” and under that Statute it has been held that an order obtained like the present by one of the clients *ex parte* must be discharged: *Hoby v. Pritchard*, 2 M. & W. 124; *Re Perkins*, 8 Beav. 241; *Ex parte Mobbs*, 8 Beav. 499; *Re Lewin*, 16 Beav. 608.

## CAMERON v. UPPER CANADA MINING COMPANY.

*Order pro confesso.*

It is irregular to take an order *pro confesso*, where a *pro confesso* note stands in the Registrar's book unvacated. Strict service of an office-copy of the bill duly stamped will be required before an order *pro confesso* can regularly issue.

*Mr. Moss* moved on notice to set aside an order *pro confesso*, against the defendant, the Mining Company, for irregularity, on the following grounds:—

1. That no proof of service of the bill on defendant was produced, and that the affidavit filed does not shew that the office-copy bill was stamped.
2. That the order was made after a note that the said defendants were in default for want of answer, had been entered in the Registrar's office, and stood unvacated.
3. That no certificate of the cause was filed on the application in Chambers for the said order *pro confesso*.
4. That an order *pro confesso* against a Company is not authorised by service on a Director.

He contended that the wording of the Act of Incorporation of the Company, even if it covered the present service, would not authorise taking the bill *pro confesso* on such service. He referred to order 54, and *Counter v. Commercial Bank*, 4 Grant, 230. Unless the service was made under Order 54, the plaintiff could have no right, except such as he had before the order. After the service on *Merritt*, the Director, service had again been effected on the President of the Company. Defendants might possibly have attended on the 9th for the purpose of filing their answer, which, if the service on the President was the proper course, was due on the 11th, and finding note *pro confesso* have taken steps to set it aside.

*Mr. Smart*, in support of the order, urged that the affidavit was in the form given by the Court, except so far as it was varied in accordance with order of February, 1865. He could now, if permitted to file further affidavits, shew clearly that a proper office-copy had been served. There was no one to whom notice of abandoning note *pro confesso* could have been given. Service on a director was good service under the Act of Incorporation. An attempt had been made to serve the President, but it was ineffectual. He moved for leave to file a further affidavit.

THE SECRETARY declined to permit a further affidavit to be filed. The plaintiff had had ample notice, and knew of the service being questioned, and should have come prepared to support it.

*Mr. Smart* cited *Davis v. Barratt*, 7 Beav. 171, and contended that even if the order were set aside, it ought to be without costs.

*Mr. Moss*.—The present order should be granted with costs, if granted at all. The order, *pro confesso*, was taken very unnecessarily, inasmuch as the plaintiff was aware that the company intended to answer, from a letter received from their Solicitor.

**THE SECRETARY.**—I think the order *pro confesso* should be discharged with costs. There was really no evidence of the defendant having been served with an office-copy; even had service on the director been good service, which it was not: service on him would not enable plaintiff to proceed to take his bill *pro confesso* under the order of 1857.

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#### CLANCY v. PATTERSON.

##### *Contempt.*

Where a party is in contempt for not bringing in accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into.

Motion to discharge defendant who was in custody for not filing his accounts in the office of the Master at Chatham—he having now put in his accounts. The motion was made *ex parte*, but *Spragge*, Vice-Chancellor, directed notice to be given, which being done, the motion was renewed.

*Mr. Ault*, for the defendant, contended that where a party was in contempt in not putting in an answer, he is discharged on putting it in, and the question of its sufficiency is not then considered.

*Mr. S. H. Blake*, for the plaintiff. The certificate of the Registrar shewed the defendant to be in contempt, and it should be shewn to the Court that the accounts put in were sufficient before the defendant could claim to be entitled to be discharged.

SPRAGGE, V. C.—I think this is an analogous case, and that the defendant must be discharged. The plaintiff is entitled to his costs of putting them into contempt.

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### COATES v. McGLASHAN.

*Leave to appeal.*

Leave to appeal from a report was refused with costs, where it appeared that the object of the appeal was to fix executors with interest upon a sum which they had invested, and upon which a loss occurred.

*Mr. Hoskin* asked leave to appeal from a report.

*Mr. Blake*, contra, contended that the applicant was bound to make out that he had good grounds of appeal.

V. C. SPRAGGE.—The point has been decided against the appellant in this Court, upon the authority of English decisions. It would be useless therefore, to give time for an appeal, unless for the purpose of carrying it further—*i. e.*, to re-hearing or appeal; and I think this application should not be granted, as the object of the appeal is to fix executors, with interest upon a sum of money which they invested, and upon which a loss occurred, with which loss the Master has charged the executors, but has disallowed interest. Upon the authorities to which I have referred, I think to grant the application would be to grant an indulgence in order to enable the applicant to inflict a hardship upon the executors. The application could have been granted only on payment of costs, and is refused with costs.

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### STENNITT v. ARUYN.

*Title deeds, possession of—Mortgagor and mortgagee.*

The mortgagor, after foreclosure, having retained the title deeds delivered them to a third party to whom he had sold, whose Solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee, on a motion for that purpose an order was made for their delivery.

*Mr. Cameron* moved for an order for the delivery of title deeds by the purchaser from the mortgagor after foreclosure.

*Mr. D. Boulton, contra.*

SPRAGGE, V. C.—The mortgagor was purchaser from the mortgagee, the vendor delivered the title deeds, and upon the mortgage being made, they remained in the hands of a the purchaser, the mortgagor. Final order of foreclosure was obtained, and afterwards the mortgagor delivered the title deeds to one McGill, to whom he sold, and who is not a party. The Solicitor of McGill claims a lien upon the title deeds for costs. McGill himself makes no claim. I think the lien cannot prevail. Certainly not upon a delivery, after the final order for foreclosure, and probably not before. The title deeds were all along in the wrong hands, and the right to have them, apart from any agreement to the contrary, which is not shewn, was always in the mortgagee. The decree in a foreclosure suit directs a mortgagee, upon redemption, to deliver up the title deeds to the mortgagor, this upon the assumption, of course, that they are in the hands of the mortgagee. If through misapprehension, or accident, they are left in the hands of the mortgagor, this Court should, I think, make an order for the delivery so as to do complete justice between the parties, and not leave the mortgagee to proceed for them at law.

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GREAT WESTERN RAILWAY COMPANY v. JONES.

*Amending—Parties—Costs.*

Where a question affected the right of the Government to the land granted in a patent, the Attorney General was held to be a necessary party, and leave to amend was granted to enable him to be added as a party, although the defendant was in a position to move, and made a counter motion, to dismiss, but the defendant was allowed costs.

*Mr. Roaf* moved for leave to amend. This bill in its nature is defensive, being brought to restrain an action of ejectment improperly brought by Jones and Mrs. McNabb, and in a suit of the kind every facility should be afforded to the plaintiff.

*Mr. Blake*, Q. C., contra, moved to dismiss. The amendments proposed are futile, and what is asked cannot be decided in the decree in the cause.

**SPRAGGE, V. C.**—While the argument was pending, I said I thought I ought not to exclude from the bill the matter of the proposed amendments, but I thought the Attorney General ought to be a party; that a question which would affect a patent granted by the Crown in this Province, and upon which not the discretion of the Crown, but the right of the Government here to the land granted, was brought in question, and which, if decided adversely, would give the grantee a claim at least upon the justice of the Crown, might not be decided without the Crown being represented in the suit. The parties admit the correctness of this view and Mr. Roaf asks an order for leave to amend according to his notice of motion, and to add the Attorney General as a party. The learned counsel for the defendant will, on consideration probably acquiesce in this. It does not seem likely that the cause can be carried down to hearing at the next sittings at Hamilton. I do not grant the order to dismiss, but under the circumstances think the defendants moving entitled to their costs of the application. The costs of the amendments to be costs in the cause.

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MASON v. SEENEY.

*Attachment.*

It is improper to have recourse to an attachment when the object sought can be attained without such process. Where, therefore, a party directed to execute a conveyance, had come into town for the purpose of executing it, although after the period in which strictly it should have been done, and the plaintiff's Solicitor, with a knowledge of these facts, issued an attachment, it was set aside with costs.

*Mr. Spencer* moved to set aside attachment.

It appeared by the affidavits filed that the plaintiff took out the order for the attachment after he was informed that

the defendant was in town for the purpose of executing the deed.

*Mr. Smart* appeared for the defendant. Dan. Pr. last edition, 469 and 466, were referred to in the argument.

**SPRAGGE, V. C.**—If the order for attachment had been drawn up properly, the defendant would have had the right and the opportunity of executing the deed without being put to the trouble that he was in executing it, and the plaintiff would probably not have had the opportunity of issuing the attachment. Whether issued for the purpose of getting costs, or procuring delivery of possession not ordered by the decree, I think it shewn it was not necessary to issue it for the purpose of procuring the execution of the deed, in short, this was known to the plaintiff's Solicitor. I must therefore set aside the attachment, defendant undertaking to bring no action.

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#### THORNE v. CHUTE.

##### *Costs.*

The Court will direct the costs of a guardian to be paid before granting a vesting order to the purchaser.

*Mr. S. H. Blake* moved for vesting order on the part of a purchaser—the payment of the money into Court having been dispensed with. On part of infant defendants it was asked that the guardian's costs be provided for.

**SPRAGGE, V. C.**—I think that all costs of the guardian which the plaintiff is liable to pay, must be provided for. If the money had been paid into Court, the Court would provide for such costs out of the moneys in Court, and the Court will not sanction a proceeding out of Court which would oust the guardian of his costs.

**MACPHERSON v. MACPHERSON.***Writ of arrest—Setting aside.*

The Court in an alimony suit on a motion to discharge the defendant from arrest under a writ of arrest will look into the merits of the case so far as to enable it to judge whether the plaintiff has reasonable grounds to expect to succeed in her case, and in the absence of her shewing such fair and reasonable grounds: or in the event of the defendant displacing the *prima facie* case made by her on obtaining the writ, he will be discharged.

A writ of arrest had been granted on the affidavit of the plaintiff, alleging violence and ill-treatment on the part of the defendant, and shewing that the defendant had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the violence and ill-treatment were denied. The plaintiff was shewn to be a young, robust woman, the defendant an old man of sixty-eight years; and the conduct of the plaintiff to have been violent and very immoral and unchaste.

On the denial of the defendant of any intention to leave the Province, and under the circumstances above stated, the writ was ordered to be set aside.

*Mr. Ault* moved on the part of the defendant for his discharge from the custody of the Sheriff under a writ of arrest. No one appeared for the plaintiff.

**SPRAGGE, V. C.**—This is a suit for alimony, and the defendant is in the custody of the Sheriff upon a writ of arrest, marked for \$350, and now applies to be discharged. Notice of the application has been given, and no cause shewn. It is, however, necessary to see that he is entitled to what he asks.

The grounds made by the affidavits filed upon this application are—first, that the plaintiff was not, and is not intending to leave the Province, and never stated such to be his intention; and, second, that he is not guilty of any of the acts imputed to him by the plaintiff's bill, and upon which she founds her claim for alimony; and further, that the plaintiff has been guilty of adultery, and has, therefore, forfeited her right, if any, to alimony. This is, therefore, an application to set aside the arrest upon the merits. The defendant has not put in his answer, and the first question is, whether before answer a defendant can move to be discharged upon the merits. It has been held that he cannot, but that was under the old system of pleading, and it is not

now necessary to go further back than the case of *Anderson v. Stamp*, 11 Jur. N. S. 169. In that case, Sir W. Page Wood explained, with his usual clearness, the reason why, when the bill contained interrogatories, the defendant was bound to answer them before applying for his discharge; and why, after interrogatories were disused, the reason no longer applied. I cannot do better than quote the learned Vice Chancellor's own words: "As matters originally stood, if an application were made for a writ of *ne exeat*, or for any other purpose, the bill would have stated all the proceedings upon which the plaintiff founded his equity, and interrogated as to those proceedings, and the defendant would have had an opportunity of answering those interrogatories if he thought fit; or if he did not think fit, then the motion would be made in the absence of any such answer. Then the practice of the Court seems clearly upon the authorities to have been this, that if the defendant did not answer all the interrogatories administered to him, the simple affidavit made to hold the defendant to bail upon the writ of *ne exeat*, would remain as of full effect, notwithstanding any contradiction the defendant might think fit to make to it by affidavit; and that, for very good reason, because if he did not choose to answer the interrogatories of the bill, but simply made his own case on affidavit, and at the same time avoided giving that discovery which the plaintiff was entitled to, the plaintiff would have a right, at least up to the hearing, to say, "I must have security that when my rights are determined, I shall find a person in this country who will be responsible in respect of the matters I allege." On the other hand, if, being so interrogated, the defendant put in his answer, it is equally clear that the Court looked into the answer to see how far it raised a case which, on the probabilities of the whole matter, was sufficient to have the writ discharged; and it would either discharge the writ or have an inquiry before the Master as to what amount of security should be given by the defendant for the possible debt." In the case I have cited, an answer had been put in; but it is clear from the reasoning of the learned

Vice Chancellor, that he regarded it not as an answer in the formal technical sense, but simply as a statement of facts upon oath ; and that he would have admitted it if it had been an affidavit.

Then as to the merits. The defendant does not very satisfactorily displace the case made by the plaintiff as to the former being about to leave the Province. He leaves unexplained the strong fact that he had sold by auction all his farming utensils and stock, and that he had also offered his farm for sale. Assuming his denial of intention, and his denial of having expressed such intention to be as explicit (which they scarcely are), as the allegations on the part of the plaintiff, the sale of stock and utensils and the offer to sell the farm, the defendant being a farmer, amount to conduct which unexplained does in my mind outweigh the denials on the part of the defendant, and see *Whitehouse v. Partridge*, 3 Swanton, 375 ; and *Amsinck v. Barklay*, 8 Vesey, 597.

There arises then the important question, how far the Court will go into the merits of the case itself, not merely the merits of the application, but the merits made by the plaintiff's bill ? and I find upon looking into the cases, instances to a greater extent than I expected, where the Court has gone into the merits of the case, to determine whether or not the writ should be allowed to stand, and if so, to what amount. In *Flack v. Holm*, 1 J. & W. 416, the Court investigated to a certain extent the question whether the plaintiff and defendant were partners or not, in order to see whether or not there was an equitable debt. Lord Eldon, however, limiting the extent of the inquiry by observing that he did not apprehend that in any of the Courts they were in the habit of entering into the affidavits before them, further than to inquire whether there was " a fair and reasonable cause for such supposition or probability that the plaintiff will succeed in the action." In *Grant v. Grant*, 3 Russell, 610, the question was reduced to one of *quantum*, the amount for which the writ ought to be allowed to stand, and Lord Eldon said :—" However troublesome and inconvenient such deci-

sions may be, it is necessary to the ends of justice that they should be submitted to." In *Sichel v. Raphael*, 4 L. T. N. S. 114, also, the merits are discussed as they also are in the case to which I have already adverted, of *Anderson v. Stamp*.

My conclusion from the cases is, that if upon the materials before the Court it is left a fair and reasonable question whether the plaintiff is not entitled to succeed in his suit, the Court will not deprive him of the security of his writ; but if the defendant so far displaces the plaintiff's case that there is not in his favour such fair and reasonable question, the defendant will be discharged. Ordinarily, of course, the question is whether there is an equitable debt, and if so to what amount; but I see no reason why the principle of the decision should not apply to a case of alimony.

In this case, the husband is in his sixty-eighth year, the wife—a second wife—a woman of thirty, and upon the question of physical strength, the affidavits give it altogether in favour of the woman. The bill makes a number of charges of grievous cruelty against the defendant; but in the plaintiff's affidavit filed for the writ of arrest, she verifies none of them, with the single exception that in June, 1867, he turned her out of his house, giving no particulars. She says further, that in the following month, he threatened to abandon her; in another paragraph using the expression "when he abandoned me in the month of July," a very loose way of stating a fact, if meant as a statement of a fact. The defendant in his affidavit denies that he ever turned her out of his house or abandoned her, or ever offered her any violence. There are also filed upon this application the affidavits of two daughters of the defendant, and of two other persons, from which it would appear that the strength to commit violence, and the actual violence of temper and conduct, have been on the part of the wife, and not on the part of the husband; and they impute to her gross and shameless language and conduct, and the actual commission of adultery; and these affidavits are unanswered, their allegations and imputations undenied.

Looking then at the very meagre case made by the plaintiff's own affidavit, and that unsupported by any other testimony—looking on the other hand at the affidavits filed on the part of the defendant, which render in the highest degree improbable any of the violence—if violence is meant to be charged—spoken of in the plaintiff's affidavit, and considering that the plaintiff has not denied the imputations contained in those affidavits, imputations, too, of a character which one would expect to be emphatically denied if untrue—I must regard the plaintiff's case as displaced, and must hold the defendant entitled to his discharge.

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SIMPSON v. OTTAWA RAILWAY COMPANY.

*Solicitor—Unnecessary appearance.*

Where a Solicitor appeared to represent parties who had been served with notice being claimants in the Master's office, but were not in the least interested in the question then at issue, and asked for costs. The Court regarded his conduct "such as ought to be discouraged by this Court," and refused him costs.

This was a case where a party petitioned for payment out of Court of certain funds to which he established a claim.

*Mr. S. H. Blake, for petitioner.*

Counsel also appeared for two other parties who had proved claims in the Master's office, but who were in no way interested in the question on which the allowance of the present claim turned, and asked for costs.

**SPRAGGE, V. C.**—The case of the petitioner appears to be proved, and an order is to go for payment to Reynolds (the assignee of the petitioner) of the ratable proportion payable in respect of the bonds held by Arnold, the petitioner. With respect to the costs of the Solicitor representing the two claimants, he appears only to ask for costs, having no possible interest in the question, and this being known to him necessarily from the proceedings in the cause, it was not a point for him to consider whether his client could be

effected by the success of the application. I think he ought not to have appeared, and that I may regard his appearance to ask for costs as conduct that ought to be discouraged by this Court. I do not think the authorities oblige me to give costs in such a case; and I am of opinion that in such a case they ought not to be given.

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COSSEY v. DUCKLOW.

*Form, shape, type, dates, &c., of bill.*

Where a bill had been filed not complying with the Orders, the dates not being expressed in figures, although the bill was printed, and not being in pica type nor of the usual size as required by the Orders, the service of a copy of it was set aside; the fact of the Deputy Registrar receiving and filing it, not being deemed a bar to the motion.

*S. H. Blake*, for the defendant, moved that the bill filed be taken off the files, as having been irregularly and improperly filed, on the following grounds:—

1. That the said bill having been wholly printed, does not comply with the order of the Court requiring all dates and sums in printed proceedings to be expressed in figures, and that in the said bill dates and sums are expressed in words.

2. That the said bill in like manner does not comply with the order of Court requiring printed proceedings to be printed on paper of the size and form in use previously to the issuing of such order, and requiring the same to be printed with pica type, and that such bill is not printed with pica type, and that such bill is not printed on paper of such size and form.

3. That the prayer in the said bill is unintelligible, and it does not appear what relief is sought for thereby.

Or, that the service of the said bill upon the defendant be set aside with costs on the above grounds, and on the ground that the prayer in the said bill asks for a foreclosure of the defendant's equity of redemption in the premises, whereas the notice on the copy of the bill served on the defendant states only that the said premises will be sold.

It was contended that these objections were not merely technical or unimportant ; the highest Court in the land, the Court of Appeal, had refused to receive appeal books unless printed in the form and size directed by the Orders, and this Court should not be less particular. The prayer of the bill was most peculiar, and it was difficult to say whether it prays a foreclosure or sale, and the endorsement was clearly wrong, as it informed the defendant that the plaintiff sought a foreclosure or sale, whereas it should have pointed out distinctly which of these alternatives he sought.

*Mr. Moss*, for the plaintiff, pointed out that the affidavits of service read did not shew that the bill filed contained the objections complained of. The office-copy alone was complained of; for all that appeared, the original bill might be altogether in writing. The Deputy Registrar had filed the bill, and it was to be assumed that he had done his duty and done so correctly. At any rate, the order directing Registrars what bills to file, appeared only to apply to Registrars and not to Deputies. No order could be made on this motion to take the bill off the files, whatever might be done as to the office-copy served. As to the endorsement, the order affecting that applied only to *præcipe* decrees.

*Mr. Blake*, in reply. The affidavit shews that the paper served was a copy of the bill filed, and it will be assumed that it is printed in the same type and filled up in the same manner. There can be no distinction between bills filed with the Registrar or with a Deputy Registrar. The fact of the Deputy Registrar having filed does not preclude coming here, or to the Court, to shew that it is irregularly filed. It is a less expensive proceeding than allowing the plaintiff to proceed with his case, and contesting the correctness of the copies afterwards ; he cited *Totten v. McIntyre*, 2 Cham. Rep. 80.

**THE SECRETARY.**—I do not think that I can order the bill to be taken off the files, as there is no evidence before me that the original bill filed is printed in improper type, or even that it is printed at all. The argument that the office-

copy being printed, I must assume that the original is printed, otherwise the copy served would not be an office-copy, is untenable. It is not necessary that an office-copy should be a *fac-simile* of the original.

I must, however, set aside the service upon the defendant, Ducklow. The orders are plain and explicit in their terms, that pleadings and all other proceedings may be written or printed, or partly written and partly printed: and, that when printed, dates and sums occurring therein are to be expressed by figures; and that they are to be written or printed on good paper of the size and form heretofore in use, and if printed, they are to be printed in pica type. Here the office-copy is neither printed in pica type nor on paper of the proper size, and, though wholly printed, dates and sums are not expressed in figures, but in words. The Deputy Registrar having filed the bill is no bar to the motion. It is true the order is express that he is not to file any bill which does not comply with its requirements; but his having neglected his duty is no reason why the Court should not interfere to enforce obedience to its own rule. In the course of the argument it was urged that the only penalty for disobedience to the order is that the Solicitor filing an irregularly printed bill cannot get the costs. The defendant might have abstained from making the present motion, and then in the event of the plaintiff obtaining a decree with costs, have objected on the taxation to any costs being allowed for the bill or the office-copies, and I think the taxing officer would be bound to give effect to the objection, even though the bill had been received and filed by the Deputy Registrar; but there is nothing to prevent the defendant making the present motion, if he chooses to take such a course.

As to so much of the motion as seeks relief on the ground that the prayer of the bill is unintelligible, I cannot, I think, deal with it on a Chamber application. If such applications could be made in Chambers, I fear the Chamber business of the Court would be increased to an alarming extent. The plaintiff must pay the costs of this motion.

**SMITH v. GUNN.**

*Order of Revivor improperly obtained on praecipe set aside, on terms—notwithstanding delay in making the application.*

The defendants, though aware that A. had no interest in the matters in question, made him a party plaintiff, by order of revivor obtained on *praecipe*. A was then and for some time afterwards under the belief that he had been made a party properly; and even after he found out that he had been made a party improperly, he did not apply to have the order of revivor set aside as against him, till he found that he was prejudiced by it. He then petitioned to have the order set aside as against him; and the Court granted the application, on the terms of his paying the costs of the petition and any costs that had been incurred by his having been made a party.

In this case a decree for specific performance had been made, under which accounts had been taken before the Master at St. Thomas. Mr. P. McGregor, of Toronto, barrister, afterwards caused to be sold the interest of the vendee, Smith, at Sheriff's sale, and bought the same himself, and took a Sheriff's deed for the same, under the belief that Smith had got a legal title from the vendor Gunn. The suit had abated by the death of Hedden, one of the defendants. An order of revivor was then obtained, on *praecipe* making Mr. McGregor a party plaintiff, and the representative of Hedden a party defendant. The cause was set down by the defendants, to be heard on further directions.

*Mr. McGregor*, for the plaintiffs, requested that the cause should stand over till he could ascertain whether a sale or a rescission of the contract was most desirable. He had hitherto been under the impression that he had got a title to at least a portion of the premises, and that consequently he had been properly made a party. But owing to an affidavit of the defendant (Gunn), which was made at the request of his Lordship the Chancellor, before whom the cause was heard, he (Mr. McGregor) ascertained, before the cause was finally disposed of, that he had obtained no title to any of the premises. He did not, however, take any steps to be relieved till after a decree had been made rescinding the contract, and ordering the plaintiffs generally to pay the

defendants' costs. Nothing had been said on the hearing on further directions as to costs, except in the event of a sale. Mr. McGregor then presented a petition, praying to be relieved from paying any costs, or only such as had been occasioned by his having been made a party, on the ground that he had been made a party plaintiff improperly, and that the defendant's Solicitor was aware of this when the order of revivor had been made. His Lordship, however, refused to grant the prayer of the petition, till the order of revivor should be set aside. A petition for that purpose was accordingly presented, which was heard along with the other. Mr. McGregor, in person, supported the petition, and contended that the order of revivor should be set aside on the merits, as it contained a material mis-statement, known to be such to the defendant's Solicitor, and not known to be inaccurate by him till upwards of six months after it had been made.

*Mr. Hoskin*, for the defendants, argued that Mr. McGregor had waived the irregularity by acting on the order of revivor.

VANKOUGHNET C.—Decided that the prayer of the petition should be granted on payment of the costs of the application, and also any costs which had been occasioned by Mr. McGregor having been made a party. Order accordingly.

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#### SUNLEY v. McCRAE.

*Costs of executor de son tort—Interest on unpaid purchase money.*

Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred.

A mortgagee, having sold the mortgaged premises, after the death of the mortgagor, and a balance remaining in his hands, after retaining the amount due on the mortgage,

while there was no person qualified to receive this balance, it was referred to a Master to enquire whether he was justly chargeable with interest.

This was an administration suit to administer the estate of John Thorpe, late of the town of Guelph, in the county of Wellington, in which the ordinary decree for administration had been obtained by one Sunley, one of the creditors. The defendant McCrae had proved the will, but the other defendant, who was a son of the testator, had not done so though he was named as an executor and trustee in the will, and he had acted as such from the time of the testator's death; and in fact he and others acted for some time before Sunley, the other executor, had proved the will.

The usual accounts were taken by the Master at Guelph, who found that part of the testator's real estate had been sold by a mortgagee, under power of sale, after the testator's decease, and that there was a balance of the purchase money in the hands of the mortgagee's representatives; this had not been paid over, because it was very uncertain who was entitled to receive it, as the testator was largely indebted at the time of his disease, and his personal assets were not nearly sufficient to pay his debts.

On the hearing of the cause, on further directions,

*Mr. Blake*, Q. C., for the plaintiff, asked that the outstanding estate of the testator should be realized and applied to the payment of debts, and that the executor *de son tort* should be disallowed his costs of the suit.

*Mr. Palmer*, for the executor *de son tort*, contended that he should be allowed his costs as between Solicitor and client, as he had compounded many debts due by the estate for less than their full amount. He also asked that the defendant, McCrae, should be disallowed his costs of administration and of the suit, because, as he contended, it was not necessary to take out letters of administration, and it did not appear that Mr. McCrae had done anything as executor.

*Mr. McGregor*, for the defendant McCrae, contended that he should be allowed not only his costs of the suit,

but that they should allowed as between solicitor and client; and that he should also be allowed all his proper disbursements as executor.

THE CHANCELLOR, before whom the cause was heard, allowed the executor *de son tort* his costs of the suit as between party and party, except same costs which had been occasioned by his own misconduct in the Master's office. He also allowed McCrae his costs of the suit as between solicitor and client, observing that he would be entitled to his disbursements for administration as a creditor of the estate; and he directed a reference to the Master at Guelph, to enquire whether the representatives of the mortgagee should be charged with interest on the balance of the purchase money in their hands. The outstanding estate of the testator was brought in and applied as asked for by the plaintiff.

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MCLHOLLAND v. DOWNS.

*Amending interpleader issue nunc pro tunc—Relief granted to a party who appeared only to shew cause, and had not given notice of asking for it.*

The Court has jurisdiction, and will exercise a discretion to do substantial justice between the parties, and to that end will grant relief or indulgence to the party who has not given notice of his intention to ask for it, and although the matter is before the Court, upon the application of the opposite party.

Where an interpleader order had been granted to try the ownership of certain goods seized under *fi. fa.* an interpleader issue was tendered by one party which contained an error, the other side, whilst pointing out the error, refused to agree to its amendment, but gave notice that he would not accept or act on the issue, and then moved to set aside the writ of interpleader and notice of trial. The Secretary refused the application and gave the other party leave to amend the issue *nunc pro tunc*. On an appeal from the order thus made, the Secretary's decision was sustained.

It appeared that an order had been taken out directing the claimant of certain goods seized under a *fi. fa.* issued from this Court to interplead. That an issue was made out and a copy served on the plaintiff's Solicitor which was not in the terms

of the order authorizing the issuing of the writ; the order was to try the question of ownership of the goods at the time of the seizure, the issue tendered was to try whose the goods were, at the time of the issuing of the writ. The plaintiff's Solicitor verbally objected to this issue, but refused to agree to its being amended, and wrote a letter to the claimant's Solicitor, saying that he should not act on it or recognise it. This imperfect issue was served on the 24th February, and was amended by the claimant's Solicitor and reserved on the 2nd of March. The County Court, at which the trial was directed to be had, commenced its sittings on the 10th March: on the 9th, notice was given of an application to set aside the interpleader issue and notice of trial, and the order on which it issued, and the motion came on the 12th March and was refused, and the claimant was allowed to amend his issue *nunc pro tunc* on payment of costs. From the order then granted the present appeal was made.

*Mr. Hodgins* appeared for the plaintiff and contended that, by the Secretary's order, the claimant was placed in as good a position as if he had served a proper and correct issue at the right time, whereas it was not only incorrect, but served too late in the first instance, and it was a hardship on his client to be forced down to trial under such circumstances, the notice of trial was for the 10th. The claimant had no right to amend or alter the issue without order, there was no order at the time for such amendment, his proper course would have been to apply in Chambers for an order. The Judge of the County Court trying the issue could not give him leave to amend, he had no such jurisdiction. If the interpleader issue came from the Court of Chancery, an application must be made to the Judge of that Court for leave to amend it. *Wright v. Skinner*, 4 Dow, P. C. 727, and *Chitty's Arch.* Pr. 1887, were referred to in the course of the argument.

*Mr. Curran* replied and supported the Secretary's order, and referred to *Chitty's Arch.* Pr. Ed. 1862, 891. The

trial at law had taken place on the 14th March, the plaintiff had ample time to be ready. A verdict was rendered for the claimant. He had applied to plaintiff's Solicitor for leave to amend the issue and correct in it what was a mere oversight, but this had been refused. He urged that such Solicitor should himself have altered the issue, if dissatisfied with it, as it was mutually their interest and their duty to see that a proper and correct issue was drawn up. As to the correctness of the Secretary's order, it was in the discretion of the Secretary to make it, and therefore would not be interfered with on appeal.

SPRAGGE, V. C.—The Secretary refers to *Dick v. Munden*, 13 W. R. 1013 (24th July, 1865), S. C. 11 Jur, N. S. 819. The above case *Dick v. Munden* seems to warrant such an order as was made in this case. An application was made by a defendant for security for costs, by reason of the misdescription of his place of residence contained in the bill. The Master of the Rolls was in favour of the application and directed security for costs to be given; and thereupon, the plaintiff asked for leave to amend by inserting plaintiff's proper address in the bill instead of giving security for costs; and this was allowed by the Master of the Rolls, although objected to by the defendant. From this it appears, and I am glad to find it so, that the Court feels at liberty to deal with a case, upon its being before the Court in such manner as it thinks conducive to the ends of justice, and to grant relief or indulgence to a party who has not given notice of his intention to ask for it and although the matter is before the Court upon the application of the opposite party. This disposes of the objection that it was not competent to the Secretary to make the order. With regard to the propriety of the order, the Secretary informs me that it was not represented to him by the plaintiff's Solicitor that sufficient time was not afforded to him to go to trial. It is now said that a verdict passed for the claimant, in the absence of the plaintiff, who did not appear, relying, perhaps, upon his objection to the regularity of the order. If he conceives

that the merits are with him upon the issue in question, upon the interpleader, he may now apply, upon affidavit, to set aside the verdict, and for a new trial upon such terms as the Secretary may think reasonable. Such application will be before the Secretary.

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#### WILSON v. GOULD.

*Good Friday.*

Where notice of motion had been given of an application to commit for not bringing in accounts in the Master office, and four days intervened between the service and the motion, one of which was good Friday, during which the Master's Office had been closed the Secretary refused the application without costs.

*Mr. Snelling* moved for an attachment against a party for not bringing in accounts in the Master's office. It appeared that after the notice of motion had been given the accounts had been filed, and the present motion resolved itself into a question of costs, and it turned upon whether sufficient notice of the present motion had been given.

*Mr. Blake* for the defendants, contended that he was entitled to four days' notice. In this case three days only had intervened, one of the four being Good Friday, during which the Master's Office was not open, and therefore he had less time than he was entitled to, to investigate the proceedings there and prepare the accounts. When the practice authorized the issue of orders *nisi*, the party had four clear days, and he should be in the same position under the present practice. The present notice of motion was insufficient, and the motion should be dismissed with costs. He referred to *Kelly v. Smith*, 1 Cham. Rep. 364.

*Mr. Snelling*, in reply, contended that Good Friday was not a *dies non*, and referred to *Morgan's Orders*, 513. There is no order here defining on what holidays the offices are to be closed, and in the absence of it we must follow the English

rule in *Maxwell v. Phillips*, 6 Ves. 146. In England it was necessary to make a rule of Court expressly providing that Good Friday should be a holiday in the Courts, but we were in the same position here as in England in the absence of such rule of Court. None of our Statutes treat it as a holiday. He referred to *Manners v. Bryan*, 5 Sim. 148, note, *McIntosh v. G. W. R.*, 1 Hare, 328; *Lewis v. Jones*, Cham. Rep. 120.

THE SECRETARY refused the application without costs.

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#### GOURLAY V. INGRAM.

*Interpleader—Married Woman.*

Where a married woman claimed goods seized under a *f. fa.*: and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion :—

*Mr. Moss*, for the Sheriff, moved for an order of interpleader to try the right to certain goods seized by the Sheriff under a *f. fa.* for costs issued on the part of the plaintiff. The goods had been claimed by one Elizabeth Collard, a sister of the defendant.

*Mr. A. Hoskin* appeared for the claimants.

*Mr. Hodgins*, for the plaintiff, the execution creditor.

A preliminary objection was made that it appeared from the depositions, taken and otherwise, that the claimant was a married woman, and that the husband had not been served with notice of the present application.

THE SECRETARY.—I refuse the motion with costs. A bill of interpleader could not be filed against a married woman without making her husband a party defendant, so I think the present application, which is a summary mode of attaining the same object, cannot be made in the absence of the husband.

## GOURLAY v. INGRAM.

*Interpleader Issue.*

On an application for an interpleader order it is only necessary to make out a *prima facie* case: The Court will not go into the merits of the case or try the question of ownership.

The Secretary has a discretion to grant such an order and unless it can be shewn that no *prima facie* case was made out, it will not be set aside on appeal.

An order for an interpleader to issue had been applied for to try the right of a married woman to certain goods seized under *f. fa.* to which application her husband was not a party and the motion was refused with costs, as reported in the last case, on that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application the Solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband the motion was renewed and an interpleader order granted by the Secretary,—which, on appeal, was sustained.

*Mr. Hodgins* moved to set aside the interpleader order made in this case on the application of the Sheriff, to try the claim of Elizabeth Collard to the goods seized under a *f. fa.* for costs issued in this cause. *Mr. Hodgins* read the affidavit of Mr. Skinner, the Deputy Sheriff, and in support of the motion contended that there was no evidence of any claim set up by the alleged claimant, no affidavit having been put in by her shewing the nature of her claim or interest. Mr. Skinner's affidavit did not shew it; there had, he stated, been a prior motion for the interpleader order to that on which it was granted, which motion was dismissed in consequence of the husband of the claimant not having been served with notice. The merits were not gone into on that motion, and on the second motion, when the order appealed from was made, the depositions of the claimant had not been read, and there was therefore, no evidence to support the order. The claimant stood in a different position from the execution creditor, his writ was *prima facie* evidence of his claim; but the claimant must establish her title or claim by satisfactory evidence, such was the practice at Common Law, and the same rule should be followed here. [*Mr. Moss*, who appeared for the Sheriff, “I admit this to be the rule at law.”] The

depositions referred to had not been made evidence by the execution creditor on the second motion, not having been read or used by him, and the claimant could not put it in or make it evidence.

To an inquiry by the Judge—

THE SECRETARY stated that there had been in fact but one application, which was renewed after service on the husband—the parties who formerly appeared consenting to this course as against them. The evidence referred to had been used when the application was first made to shew that the claimant was a married woman—it was not filed, but was taken away by the Solicitor of the execution creditor, and was produced again when the motion was renewed, and he (the Secretary) read it and founded his order on it.

THE JUDGE.—It ought to have been filed and not taken away.

*Mr. Hodgins* proceeded to argue that it was not the claimant who should seek the issue—the execution creditor should take the issue and try the claimant's right ; the Court had jurisdiction and could have the question tried without the expense and trouble of an issue, before the Master on affidavit, or before the Court itself, or any of its officers, being as it was a bare question of law, and involving only a very small amount. He cited *Angell v. Hadden*, 16 Ves. 202. The claimant was in the same position as if plaintiff in an interpleader bill.

*Mr. A. Hoskin* appeared for the claimant. There had been, he contended, only one motion ; no new notice had been served on him of the second application, but only on the husband of the claimant. Should it be held that the depositions spoken of had not been put in, or if read, were insufficient, he was prepared to put in further evidence, and claimed leave to do so. He cited *Poweller v. Lock*, 4 N & M. 852, where such a course had been allowed. The Court had power to direct who should prosecute the issue. The clauses in our Statute relating to interpleading had been made

the practice of this Court, when the remedy by *f. fa.* was introduced, and that practice was to send the issue to be tried at law. The Judge would not try the facts or merits of the case as to the ownership or claim, nor could they be tried before a master on affidavit, except by consent. All that the claimant had to do was to make out a *prima facie* case, and that need not be a strong one; at common law a very slight case is considered sufficient to warrant the issue of such an order.

*Molson v. Joseph*, 8 C. P. U. C. 15; *Wordell v. Smith*, 1 Campbell, 383; *Bramidge v. Adshead*, 2 Dow, P. C. 59; *Webster v. Delafield*, 7 C. B. O. S. 187; *Chitty's Forms*, 802; Con. Stat. U.C. 382, 280, secs. 8, 15, 19 were also referred to.

SPRAGGE, V. C., on the close of the argument, remarked that all he could try was, whether a case was made out to warrant an interpleader order to issue, he could not go into the merits of the claim. The case was not the same as on an interpleader bill. The jurisdiction he was called upon to exercise was a statutory one. He subsequently delivered the following judgment:—

At the close of the argument I disposed of the various points raised with the exception of one, viz.:—Whether there was evidence in support of the plaintiff's case; and if so, whether the depositions which the plaintiff points to as her evidence, are sufficient. These depositions were in possession of the Court. There were not two applications; but upon the matter coming before the Secretary in the first instance, these depositions were used by the plaintiff for a purpose connected with the application. The Secretary directed the application to stand over in order to notice being served upon the husband of the claimant. The depositions having been used should have been filed, and it was irregular for the plaintiff's Solicitor to take them away from the Court. The Secretary informs me that upon the application coming on again before him, after notice upon the husband of the claimant had been served, he used the depositions as the evidence in support of the claimant's case, upon which he founded his order. Then as to the sufficiency

of the depositions, I observed that it was not for me to try the case, but only to see whether a *prima facie* case is made out. It might be that the claimant would state herself out of Court; that it might be clear upon her own shewing that she has no case. But if a *prima facie* case is made out, the order is right. It is suggested that I may adjudge upon the rights of the parties upon this application. I do not know that I can do so under the Act; but there are other objections. The Solicitor of the claimant states that he has other evidence to adduce; and besides, the only point before me is a question of appeal, whether the Secretary was right in directing an issue. I cannot say that he was wrong, or do otherwise than simply affirm his order, unless I find that the evidence before him was not sufficient to warrant his order. I have read the depositions, and think they are sufficient to warrant the order. The appeal must be dismissed with costs.

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#### RODGERS v. RODGERS.

##### *Infants—Conveyance—Costs.*

Where in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties, was necessarily referred to a Master, the Costs of such reference were ordered to be borne by the Testator's estate.

A question arose as to the costs of settling a conveyance before the Master. Some of the defendants were infants, and it was necessarily referred to the Master to settle the conveyance. The purchaser claimed that the costs should be paid out of the estate, and *Brown v. Lake*, 15 L. J. 34, was referred to, in which case it had been held that the costs attending the settlement of the deed of conveyance from infants by reason of the infancy of the next of kin, ought to be borne by the testator's estate.

THE SECRETARY, following the above case, held that the costs should be paid out of the estate.

## HEWARD V. HEWARD.

*Appeal—Staying proceedings in Court below.*

It is not usual to stay proceedings under a decree pending an appeal. Where a motion was made to commit for not bringing in accounts under a decree which had been appealed against, and a cross motion was made to stay proceedings pending the appeal, such cross motion was refused, the other motion was submitted to and no order made as to it or as to costs.

*Mr. S. H. Blake* moved to commit the defendant for non-production of accounts in the Master's office.

*Mr. Crooks*, Q.C., contra, asked that all proceedings should be stayed until after judgment in Appeal, and that if such judgment was in his favour there would be no necessity for his bringing the accounts into the Master's office. Should it be refused, he would be content to pay the costs of the present motion, and to bring in the accounts within a limited period. He cited *Cotton v. Corby*, 7 Grant, 72, and argued that the only question to be considered was whether staying proceedings would injure any party. Here no injury could take place; the only injury possible was the removal from the premises of some gravel, and none could be sold just now. The reasons of appeal showed a reasonable case for the opinion of the Court of Appeal, and that the object was not delay.

*Mr. Blake*, in reply, admitted the reasonableness of the grounds of appeal. There was no desire to proceed to commit, but the present motion was necessary to test the right of defendant to a stay of proceedings. It was not usual to stay proceedings in such a case. The decree of the Court was binding until impeached, and he was entitled to have it obeyed. The delay in proceeding in the Master's office would prejudice his client, and the accounts ought to be brought in, however reasonable the ground of appeal might appear. The presumption at present was in favour of the correctness of the decree, and not that it would be reversed.

**THE SECRETARY.**—On referring to *Daniel* Pr., I find that it is not usual in England to stay proceedings pending an appeal under circumstances similar to those in this case. I therefore refuse the application.

**McDONELL v. MCKAY.**

*Motion for leave to amend bill of complaint—Effect of a motion to dismiss—Additional affidavit.*

A plaintiff having failed to amend his bill till the time within which he could do so had expired; owing to a pending motion by the defendants to dismiss, held that the motion to dismiss was not sufficient excuse for the delay—and held further, that the plaintiff might, under the circumstances, file an additional affidavit, the former being insufficient, and then renew the motion.

*Mr. McGregor*, on behalf of the plaintiff, applied for leave to amend the bill by adding new parties and making the requisite changes; and he read affidavits shewing that the defendant had failed to produce documents till long after the regular time, in consequence of which it was alleged the plaintiff was unable to amend his bill in due time. The defendant then moved to have the bill dismissed, for want of prosecution; and the plaintiff forebore applying for leave to amend till that motion was disposed of. He then made the application.

*Mr. J. A. Boyd*, on behalf of the defendant, opposed the motion, and contended that a motion to dismiss was no excuse for delay in moving to amend, and that so much time had elapsed that the plaintiff was disentitled to the relief which he sought; but he admitted that the parties intended to be added were proper parties defendant, and indeed this appeared from the answers filed by the defendants.

*Mowat, V. C.*, before whom the motion was heard, permitted a further affidavit to be filed, holding that the Court had a discretion to grant or refuse such an indulgence, and the motion having been renewed on the day appointed, after a new affidavit had been filed, the plaintiff was allowed to amend his bill as proposed, on payment of the defendant's costs of the motion.

From this order the defendants appealed.

*Mr. Boyd*, for the defendant, urged that the order giving leave to amend was bad, as the truth of the proposed amendments was not supported by affidavit, the affidavit produced merely alleging in general terms that the proposed amendments written in blue ink were true, whereas it should have distinctly verified each allegation.

*Mr. McGregor*, for the plaintiff, contended that the affidavit was sufficient, as all he had to do was to satisfy the Judge of the truth of the amendment, and the Judge had the utmost discretion to grant or refuse such an order, he alone had to be satisfied.

The Court considering the order as one discretionary with the Judge refused to interfere and dismissed the appeal with costs.

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#### SHARP v. SHARP.

##### *Next Friend.*

The next friend of an idiot stands in the same position as the next friend of an infant, and is not required to establish his solvency or give security for costs, where however in the bill, the description and residence of the next friend was not given, the Secretary ordered amendment to be made within a week giving the residence and description, or the defendant to be entitled to security for costs.

*Mr. S. H. Blake*, on part of the defendant, moved that the plaintiff should name some solvent person as next friend, or should give security for costs. It appeared that the plaintiff was an idiot, and that a next friend had been named, whose solvency was now questioned. Several affidavits were read as to the fact of solvency or insolvency. It was also objected that there was no description or residence of the next friend given in the bill.

*Mr. Downey*, for the plaintiff. The next friend of an idiot stands in the same position as that of an infant, and is not called on to shew that he is solvent. As to the omission of the residence of the next friend, it was

made innocently and without any object of misleading, and had in fact not mislead any one, and it could be amended; it was usual to allow amendment in such a case. See Dan. Pr. 335.

*Mr. Blake* referred to *McBean v. Lilley* before Mr. V. C. Spragge, Sept. 1864, (reported in this volume, p. 247,) in which although the learned Judge refused an application to appoint a new next friend, on the ground of insolvency, did so because the next friend had justified to a bond for £100 security, and it was admitted on all hands in that case, that a next friend should justify in a certain amount, and vague and general statements of his solvency were not sufficient.

**THE SECRETARY.**—The next friend of an idiot should stand in the same position as next friend of an infant. As to the objection of no address being given in the bill, I make the same order as the Master of the Rolls did in *Diel v. Mendon*, (13 W. R. 1013,) and give leave to amend. The amendments to be made in one week, or the defendant to be entitled to security for costs.

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#### HEWARD V. HEWARD.

*Staying proceedings pending appeal.*

Security for the costs in Appeal, as well as that of Court below will be required to be given before proceedings in Court below will be stayed pending an appeal.

*Mr. Crooks*, Q.C., for defendant, moved that proceedings be stayed in this Court until judgment in the Court of Appeal, the plaintiffs having taken out execution for their costs in Chancery.

*Mr. S. H. Blake*, on part of the plaintiff, moved, that defendant give security for costs of the Court of Appeal.

The plaintiff had been successful in the Court below, and defendant appealed from the decree, giving the usual bond

in £100 to answer costs of Court below, if appeal were dismissed.

On the present motion, the plaintiff's council claimed that the defendant should also be required to give security for such costs as might be incurred in the Court of Appeal, before he could be heard to ask for a stay of proceeding. He referred to Con. Stat. U. C. 64, sec. 15 *et seq.* 57, 8, 9. *Palmer's House of Lords Cases*, 9, 10. *Macpherson's P. C.* 57, 58. *McQueen's House of Lords Cases*, 707, 708, 361. *Jessup v. Canada Emigration Company*. Court of Chancery Act, Con. Stat. 66, 59.

*Mr. Crooke*, Q C., for defendant, contended that the bond for £100 was all the plaintiffs were entitled to, that such was the established practice, and that the present motion sought something new, which neither the acts nor rules of Court of Appeal provided for, and that the motion could not be entertained; also that the case came within the exception in the Act, "a decree for the payment of money," and that he was entitled to have the proceedings stayed. He cited *Taylor's Orders*, pp. 246-248, sec. 6 *Winters v. Building Society*, 1 Cham. Rep. 214; *Brigham v. Smith*, reported in present volume.

**VANKOUGHNET, C.**—I think that the Legislature in designating in one of the exceptions, a "decree for payment of money," meant a decree which directed payment of money as distinguished from other decrees, and that by this they did not mean a decree which ordered payment of costs merely—as in the case for instance of a bill dismissed. I think they meant by the expression used to describe a decree of a particular character—a money decree. The orders of the Court of Appeal, framed under the Statutes by the late Sir John B. Robinson and others of the Judges, seem to me to have been made on a different construction of the Statute, as they require security to be given for costs in the case of a judgment for payment of money. The question here was not likely to have escaped the consideration of Sir John and the other Judges—and acting on the interpretation

of Sir John and the other Judges, I think I must require security to be given before staying execution. The orders require a special application to a Judge of the Court for his fiat, and I suppose in this he might impose terms not inconsistent with the Act.

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### MCBEAN v. LILLEY.

*Next friend—Solvency.*

*Semble.*—If the next friend of a married woman makes the necessary affidavit of justification, swearing that he is worth £100 over his debts, the question of his solvency or insolvency will not be gone into.

*Mr. FitzGerald* moved to stay proceedings until another next friend should be appointed. The contention was, that the next friend already appointed was insolvent, and the defendants were entitled to have another appointed. Several affidavits were filed with a view of establishing the fact of insolvency, and the depositions of the next friend, on his cross-examination were read with the same object. *Mr. FitzGerald* argued that the next friend of a married woman must be solvent, and cited *Smith Prac.* 563.

*Mr. Stevens*, on the part of another defendant, contended that the insolvency was sufficiently proved, that the affidavit of the next friend himself only shewed him possessed of personal property, a large portion of which was exempted from execution under 23 Vic.

*Mr. S. H. Blake*, for the plaintiff, contended that it was not imperative that the next friend of a married woman should be shewn to be solvent, such married woman might sue in *forma pauperis*, as in this case she had sworn she was not worth £5, *Elliott v. Ince*, 7 DeG. M. & G. 47, 67. Affidavits to interdict a next friend are only receivable where the insolvency is patent. *Hurd v. Whitteman*, 2 K. & J. 461. In this case the bond for security for costs, if given, would be for £100, and the party had

justified to that amount, and that was sufficient. The Court would not look into the question of the protection of certain chattels under the Statute in that behalf. The same protection existed in England, and it was not taken into consideration there in cases of this kind.

*Mr. FitzGerald*, in reply.—The affidavits do not shew that the next friend is worth the amount beyond the exempted goods.

**SPRAGGE, V. C.**, refused the application with costs, holding that it was shewn the next friend was worth £100 over and above all his debts, and that was all that could be asked for.

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#### HARRIS v. MYERS.

##### *Sequestration—Setting aside.*

Although as was held in *Fisken v. Wride*, a copy of the decree or order directing the payment of the money, should be shewn to have been served and a demand of payment of the money made, before a writ of sequestration can properly issue,—yet, where, as frequently has been done, a writ was issued without an affidavit filed shewing such service and demand, and the defendant had been aware of it for upwards of a year, and had appeared on a motion to compel a tenant to attorn,—it was held, he had waived any objection, and a motion to set it aside was refused.

*Mr. Bain* moved upon notice to set aside a writ of sequestration issued in this case on the following grounds:—1. Because no order directing the said writ to issue was ever made by this Court, and that the said writ was taken out on *præcipe* and without any such order being made or filed. 2. Because the said writ was issued for the non-payment of money, and not for any contempt of Court on the part of the defendant. 3. Because no demand for the money, for the levy of which the said writ was issued, was ever served upon the defendant, and no copy of the decree or order directing such payment was ever served on defendant. 4. Because, at the time of issuing said writ, no affidavit or other evidence

was given or filed of any demand upon defendant having been made for the said money, or of the order or decree having been served on defendant. 5. Because said writ of sequestration is endorsed to levy an amount in excess of that properly due.

*Mr. Hodgins* appeared to support the regularity of the writ.

*Mr. Bain* read the affidavits shewing that the writ had issued without any previous order.

THE SECRETARY, to Mr. Hodgins, who proposed to read affidavits in reply.—Do you intend to give evidence of an order having been made and served? If not how do you escape from the rule established by the Chancellor in *Fiskin v. Wride*?

*Mr. Hodgins*—I propose to shew that the necessity for the order has been waived.

*Mr. Bain* proceeded to argue that the practice laid down in *Smith's Pr.* is, that the order on which a writ is to issue should be served personally, unless the party on whom the service is to be affected is out of the jurisdiction, or a special order has been made to the contrary. As to the waiver, no waiver can possibly have taken place, inasmuch as the writ and the proceedings on it were in fact mere nullities, and you cannot waive an objection to a nulity, except by some express agreement, which is not set up in this case. It is not simply an irregularity, and even if it were, it lay on the other side to shew that when the acts which are relied on as creating a waiver took place, the defendant knew of the irregularity.

THE SECRETARY.—He knew he never had been served with any notice or order.

*Mr. Bain* cited in support of his position *Fiskin v. Wride*; *Cooper's Cham. Rep.* 214; 1 *Arch. Pr.* 630; *Tolsen v. Jarvis*, 8 *Beav.* 61; *Cox v. Tullock*, 2 *Dowl. P. R.* 47.

*Mr. Hodgins*, in support of the writ, distinguishing the present case from that of *Fiskin v. Wride*. Here the writ, and all proceedings under it, had been acquiesced in for a

great length of time by the defendant ; he had concurred in the receipt of the rents, &c., by the Receiver, although he must have known all along of the irregularity. He referred to *Macnamara* on Nullities, 25 ; *St. John v. Phelps*, 12 Beav. 607 ; 1 Dan. Pr. 171 ; 2 Russ. 461 ; and to *Harris v. Meyers*, 2 Cham. Rep. 121, where the present defendant had appeared on a motion to compel a tenant to attorn.

*Mr. Bain*, in reply contended that the argument and authorities adduced applied to a question of irregularity merely, and not to what was a perfect nullity, and could not be waived. The writ of sequestration is something more than merely a process to collect money, and it cannot be granted for non-payment of money only. The notice to defendant of the irregularity should be actual notice, not presumptive or constructive notice. He is not to be presumed to have known that to be an irregularity which was only made such by a recent decision in *Fiskin v. Wride*, which was given long subsequent to the proceedings constituting the alleged waiver. He also urged the ground of the excess of an endorsement on the writ, such writ being endorsed for \$8 as costs of writ, which was excessive, and that that alone should entitle him to have the writ set aside with costs.

**THE SECRETARY.**—The writ of sequestration here is perhaps irregular in the mode in which it was issued ; but the defendant has for more than a year at least been aware of its existence, and I must hold that he has by his delay, and by his appearing on a notice to compel a tenant to attorn, waived any right to object and acquiesced in the writ.

## JOHNSON V. ASHBRIDGE.

*Practice—Notice of motion, and reference therein to affidavit and documents—Opening foreclosure.*

Where an affidavit refers to a document and notice of reading such affidavit, is given, the document, (in this case the endorsement on the office-copy of a bill) may be read without special reference to it in the notice. A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time,—also that he has a prospect of paying the mortgage debt if time be given him, and that the property is of much greater value than the amount due.

*Mr. Blevins* renewed a motion to open foreclosure. A motion had previously been made but was disposed of on technical grounds of an irregularity in the notice.

*Mr. Hoskin* now objected that the notice was not amended.

*Mr. Blevins.*—Office-copies of the affidavits have been demanded and served, and it is too late to make such an objection.

THE SECRETARY overruled the objection on the authority of *Bennet v. O'Meara*. 2 Cham. Rep. 167.

*Mr. Blevins* proceeded. The bill had been filed in 1866, the prayer was calculated to mislead, the endorsement was for foreclosure, but the bill prayed sale or foreclosure.

*Mr. Hoskin.*—You cannot read the bill or endorsement, not having mentioned them in your notice.

*Mr. Blevins.*—They are referred to as exhibits in an affidavit which is mentioned in the notice as to be read.

[THE SECRETARY.—That is sufficient.]

The bill had been filed for a small amount of interest that was due, which might be collected in the Division Court, the principal was not due until August next. The whole property mortgaged was worth \$3 000. the mortgage money was less than \$1,000. Part of the property foreclosed had been sold by the plaintiff and an account ought to be taken of what was received for it, and if any thing was due to plaintiff defendant should be allowed to pay it, and to redeem on payment of costs.

*Mr. Hoskin*, contra—Contended that no case had been

made for opening foreclosure. The affidavits of defendant do not shew that if foreclosure opened he can pay the money, that he has tried to raise it, or has any prospect of raising it, or what efforts he has made to do so. He referred to *Brothers v. Lloyd*, 2 Cham. Rep. 119, which was a stronger case than this for the defendant, where the Chancellor refused to open foreclosure.

THE SECRETARY.—A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time; that he has a prospect of paying the mortgage debt if time be given him; and that the property is of much greater value than the amount due. These requirements have certainly not been complied with in this case, and I think I ought to dismiss the application with costs.

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#### IN RE NELSON.

##### *Witness fees.*

A public officer who has charge of documents for which he is responsible, and attends as a witness in his public capacity and in relation to matters connected with his office, will be allowed professional witness fees of \$4 a day.

VANKOUGHNET, C.—Mr. Cayley, Registrar of the Surrogate Court, declined to produce the original will of the testator, unless he be paid a larger fee than the 3s. 9d. given to ordinary witnesses. Looking at the responsibility with which a person in Mr. Cayley's position is charged, in keeping, searching for, and producing original documents, which it is of the greatest moment should be in proper custody; at the trouble and loss of time in addition, which often occur in searching for and producing such documents; that Mr. Cayley is an officer paid by fees, and that in the progress of a case he may be kept waiting in Court for hours before he is called as a witness, I think \$4 a day a reasonable al-

lowance to him. I am told by the Clerk of the Crown that in a case of *Bennet v. Adams*, in 1859, Richards C. J. ordered \$4 to be taxed to a Clerk of Assize, who attended to give evidence, in that capacity, as a witness.

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### RUSSELL V. BREEKEN.

#### *Practice—Decree on bill and answer.*

Where a cause is heard on bill and answer the plaintiff has the right of electing to pay the costs of the day and file replication and go to hearing in the usual way,—and even in a case where he had accepted the decree made on bill and answer, and on coming to settle minutes was dissatisfied with it, he was allowed the same option, on the ground that he could have exercised it on a rehearing or an appeal.

*Mr. Graham*, on part of the plaintiff, spoke to this case on the minutes pursuant to leave obtained and on notice.

*Mr. Roaf*, Q. C., appeared for the defendant.

The cause had been heard on bill and answer, and the Court taking a view of the answer, which was unexpected by the plaintiff, and took him by surprise, gave him the choice of accepting a decree in accordance with the view then expressed, or of going down to hearing, after replication, on evidence, on payment of the costs of the day. The plaintiff's counsel accepted the proposed decree; but in settling the minutes, found it operated to his client's prejudice to a greater extent than he had foreseen, and he now claimed the same privilege offered him before, of choosing the other alternative and going down to hearing. Mr. Roaf objected that whatever right the plaintiff might have had of paying the costs of the day and going down to hearing, he had deliberately waived it, and that, after consultation between two counsels engaged in the case. To permit him a fresh election now, would establish an inconvenient, if not a dangerous precedent; as the plaintiff might come back again if the present decree did not suit him, and change his mind again.

*Per Curiam*—The plaintiff might rehear or appeal from

the decree pronounced, and if dissatisfied then with the decree, which would still be the decree made on bill and answer, would have the option of electing, to pay the costs of the day and filing replication and going to hearing, and he ought not to stand in any worse position now. Mr. Graham's motion was therefore granted.

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#### MALE v. BOUCHIER.

##### *Attachment.*

A party will not be committed for disobedience of an order, where the act ordered to be done, is in fact and in effect merely the payment of money.

*Mr. Spencer* moved for an order for an attachment to issue against the defendant for disobedience of the decree made in this cause. Service of the notice of motion was proved, but no one appeared for the defendant.

**SPRAGGE, V. C.**—The bill alleges in substance that the testator held a lease with right of purchase from King's College, that by his will he directed the purchase to be completed for the benefit of the plaintiff, and that sufficient funds for that purpose had come to the hands of the executor and executrix, that the lease and the time for purchase had expired, but the Bursar of the College is still willing to sell, *i. e.*, as I read the bill that he waives the forfeiture, if any, consequently those representing the testator, have only to pay the money in order to get a conveyance. The decree directs the executor to complete the purchase within a week, and to convey to the plaintiff within another month. The decree has not been obeyed, and the plaintiff applies *ex parte* for an order to commit. The first thing is to complete the purchase, and the substantial thing, as appears by the bill, is to pay the purchase money. I think if I were to order the defendant to be committed, it will be in reality for non-payment of money, and that I should contravene the Statute.

It is not suggested that the money has been paid, or that the disobedience to the order consists in something else. If that were done, I should give the order; that not being shewn, I should run the risk of committing for non-payment of money, and that with my eyes open, for I have reason to infer that in that consists the real disobedience. If the plaintiff will shew that the money has been paid I will give the order.

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#### FIELDER V O'HARA.

##### *Master—Special circumstances.*

The Master has no authority to make an allowance not directed by the decree, however reasonable it may appear to him to be. His proper course is to report the circumstances specially, and the party claiming to be entitled can apply to the Court on further directions.

This was an appeal from the report of the Master at Brantford; the suit being brought by the infant children of James Fielder, deceased, for the administration of his estate. An administration decree was made in the cause on the 27th February, 1867, referring it to the Master at Brantford to take the usual administration accounts.

The defendant, Margaret O'Hara, the mother of the plaintiffs, was the administratrix of the estate in question. She and her present husband, the defendant, John O'Hara, had lived on part of the real estate, and worked it as a farm, and they had made certain improvements thereon, and had maintained the infant children of the intestate for several years.

The decree directed John O'Hara to account for the rents and profits of the real estate, and that the Master should allow him for the improvements, and that the Master should inquire and state what allowance should be made to Margaret O'Hara, in respect of maintaining the children for the time past, in the event of her bringing in a claim for such maintenance. She made no such claim; but the defendant, John

O'Hara, claimed in the Master's office to be allowed for his expense of maintaining the plaintiff. This was resisted, but the Master reported in favour of allowing him \$312 in respect of past maintenance.

From this report the plaintiffs (the children) appealed, on the ground that the allowance to John O'Hara in respect of maintenance was not authorized by the decree or warranted by the evidence.

*Mr. Wood*, for the appeal. The form of the decree precludes the Master from any inquiry as to allowance to John O'Hara for maintenance. To warrant such inquiry it should be expressly referred, and while the decree in this case directs an inquiry in favour of Margaret O'Hara, the administratrix, as to maintenance, and in favour of John O'Hara as to improvements made by him, it is silent as to any allowance to him for maintenance. But even if the decree authorized the inquiry, the report is wrong in this respect as, according to the law bearing upon the case, the defendant O'Hara is not entitled to any allowance in respect of past maintenance. It was a mere voluntary expenditure, if any, and one that he cannot recover against the estate or the plaintiffs.

*Mr. T. H. Spencer*, contra. The Master had jurisdiction under the general orders of the Court to enter upon the inquiry as to maintenance, without any special direction in the decree. Order 42, sec. 13. *Taylor's Orders*, 2nd ed., page 143. As to the merits he contended that the finding of the Master was correct. The sum allowed was a reasonable amount in view of the evidence, and the defendant John O'Hara is justly entitled to be repaid this expenditure. Whatever may be the principles applying to cases of voluntary payments at law, those principles are not applicable in this Court to a case of this kind. It has been the constant practice in equity to decree an allowance for past maintenance in cases similar to the present. On this point he referred to the following authorities:—

*Brazill v. Brazill*, 11 Grant, 253; *Forestal v. Doyle*,

8 Ir. Eq. R. 520; *Edgeworth v. Edgeworth*, Beaty, 328; *Ex parte Darlington*, 1 B. & B. 240; *Billingsly v. Critchell*, 1 B. C. C. 268; *Barlow v. Grant*, 1 Vern. 255; *Story, Eq. Jur. secs.* 240, 511; *Collis v. Blackburn*, 9 Ves. 470; *Greenwell v. Greenwell*, 5 Ves. 194, 199; *Bruin v. Knott*, 1 Ph. 572; *Ex parte Bond*, 2 M. & K. 439; *Ex parte, Chambers*, 1 R. & M. 577; *Reaves v. Brymer*, 6 Ves. 425; *Sherwood v. Smith*, 6 Ves. 454.

**THE CHANCELLOR.**—I think the Master should not have allowed O'Hara anything for maintenance, as the decree did not order or authorize it, and under the present orders I think the Master had no power of himself to make the allowance; but he might have reported the facts as special circumstances, and for this purpose his report thus corrected by this order can stand, and on further directions the defendant can apply to have the amount allowed to him. It seems a reasonable charge, and one for which the defendant should be allowed.

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#### BRIGHAM V. SMITH.

##### *Order to revive.*

Where an order to revive is obtained to add a party who is an assignee of the defendant, it is not necessary to describe him in the order as assignee. If an order is complained of, as irregular, it is not competent to the opposite party to move to amend or alter it. His course is to move to set it aside, and this must be done within the time limited by the orders regulating the practice.

In a suit for an account of the partnership dealings between the plaintiff and defendant in Crown timber limits on the Ottawa, a decree was made for the taking the usual partnership accounts. Pending the reference the defendants made an assignment, under the Insolvency Act, to Francis Clemow. The Crown Timber Office declined to recognize the assignments under the Act, and a separate transfer was thereupon made without reference to such assignments.

The plaintiff obtained an order to revive on *precipe*, which was served on Clemow and Smith—the time to move against the order had expired. An application was now made on behalf of Clemow and Smith, complaining that the *precipe* upon which the order to revive had been obtained did not express that the cause should be revived in the name of “Francis Clemow, *assignee of the said Joshua Smith*,” that the order to revive did not express that the suit should stand revived in the name of “Francis Clemow as *assignee* of the said Joshua Smith,” and that Joshua Smith, being an insolvent, his name ought to be omitted in the style of cause and proceedings.

*Mr. J. A. Boyd*, for the defendants, contended that the order ought to have expressed that the suit was revived in the name of Francis Clemow as *assignee of Joshua Smith*, and not have merely revived the suit in the name of Francis Clemow, without stating in what capacity he was made a party: the form given of the order to revive seems to contemplate this. And also that Smith ought not now, being an insolvent, to be continued a party to the record; he could only be answerable for costs, and *Wilson v. Chisholm*, 11 Grant, 471, decides that an insolvent is an improper party to the record for that purpose.

*Mr. A. Hoskin*, for the plaintiff, contra. The *precipe* shews in what capacity Mr. Clemow is added as a party. It is only necessary to state in the *precipe*, the circumstances shewing the change of interests. The order recites that Smith had made an assignment to Clemow under the Insolvency Act, and that sufficiently shews in what capacity he is added, without expressly directing in the order that the suit do stand revived in the name of “Francis Clemow, *assignee of Joshua Smith*,” the name of Francis Clemow alone is sufficient—the style of the cause in subsequent proceedings contains the words “*assignee of Joshua Smith*.” The parties are now too late to move against the order. The assignment was made *pendente lite*, and the transfer in the Crown Timber Office was only a common transfer from one

party to another, and the plaintiff was justified in retaining Smith as a party, inasmuch as the Crown Timber Office did not recognize the assignment under the Insolvent Act. The cases relied on by the other side were cases of demurrer for want of parties, not cases like this, of assignment in insolvency after decree.

THE SECRETARY.—I refuse the application with costs. The defendant has no right to move to amend the order obtained by the plaintiff; he might, perhaps, have moved to set it aside as irregular, but the time for doing so has elapsed. (I do not mean by this expression to decide that the order is irregular). Had the old practice of filing a bill of revivor still obtained, the defendant might have demurred to it, but he could not have applied to amend it.

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#### GILBERT v. JARVIS.

##### *Extending time for appealing.*

A party seeking leave to appeal, after the time limited for appealing has expired, must account satisfactorily for the delay, and shew some reasonable grounds why such an indulgence should be granted. A party will not be aided by the Court in setting up a technical defence to defeat a claim just in itself. Where leave to appeal, after the usual time, was asked under circumstances which, in an ordinary case, would have been sufficient to sustain the application, but the case sought to be made by the appellant was *strictissime juris*, and with the view of defeating an equitable claim, the motion was refused, with costs.

Motion for leave to appeal was served in March last. The Master's report finding the amount due from Mr. Jarvis in January, 1868, after the sitting of the Court of Appeal in December last, the only sittings of that Court which has been held since decree was served.

*Mr. Hector, Q.C., and Mr. A. Hoskin,* appeared on the present motion for the defendants who sought leave to appeal.

*Mr. S. H. Blake,* for the plaintiffs, and for Hamilton a creditor of the testator.

*Mr. Rae*, for Robinson, a creditor.

On the part of the defendants it was urged that until the report of the accountant was made, the defendants could not determine on their course as to appealing. No sittings of the Court had been lost, as none were held in March last. There were precedents for indulgence of the kind asked, *Heward v. Heward*, reported in this volume, and *McKenzie v. Fielding* (not reported), and *Mulholland v. Hamilton*, were similar cases, *McFarlane v. Dickson* and *Bank of Upper Canada v. Wallace* reported in this volume, and *Holley v. Cox*, W. N. Dec. 14, 1867, 292, were also referred to in the course of the argument.

*Mr. S. H. Blake*, contra, contended that no precedent could be found for such an indulgence. The cases cited were decided on special grounds not existing here; for instance in the *Bank of Upper Canada v. Wallace*, the depositions had been mislaid or unintentionally withheld by the opposite solicitor, which was a reasonable ground for delay on the part of the party seeking to appeal. Here, it was quite otherwise; Mrs. Jarvis has no claim to indulgence. She gave a bond covenanting to pay certain claims from her interest under her husband's will within three years. The bill seeks to have the estate wound up, to do, what in fact, she ought herself to have done. It is not sought to make her personally liable. Eight or ten years have passed and she has been enjoying the property without fulfilling her covenant, and now turns round and says there is nothing coming to her from the estate out of which these claims can be paid. It was an attempt to defeat these creditors, which the Court should not aid by granting her indulgence or extending the time to appeal.

The delay in the accountant's office, of which the other side complain, was caused by themselves. Numerous questions had been raised there, and every proceeding had to be taken to draw the accounts from her, hence it was, that the report was not ready till January; but the state of the accounts and the general result of them was known much earlier; and the defendants need not have delayed their appeal. He referred to a case in which Mr. V. C. Spragge

had refused a defendant leave to put in an answer to raise what was not an equitable defence. The grounds urged here are mere excuses.

*Mr. Hoskin*, in reply, referred to *Horsley v. Cox*, W. N., where it was held, that if the interest of the defendant was such that it could not be garnisheed at law, neither could it in a Court of Equity. [This case which did not appear to have been reported elsewhere, was received as of doubtful authority.]

VANKOUGHNET, C.—In this case the defendants Mrs. Jarvis and her son, Colonel Jarvis, apply for leave to bring on an appeal notwithstanding that a year must elapse before it can be heard. The year will expire on the 25th instant, and the first or next sittings of the Court will be on the 2nd July, so that the defendants will be just one week too late for their proposed appeal. Unless an intention to abandon an appeal, or indifference, and neglect had appeared, I think that generally an appellant would be assisted to get over the few days which stop the appeal here. But, the executrix, who seeks for indulgence here, is endeavouring to get rid of a claim which seems a just one, and which she years since undertook in effect, should be paid out of the very fund which she says now cannot be made responsible for it in this suit. The plaintiffs have, in fact, done what she has refused to do, having procured administration of the testator's estate and ascertained the amount due by it to her, and out of which she asked for and obtained three years' time to pay this debt. She now says that, *strictissimæ juris*, her personal debt cannot be enforced against the amount owing to her by her husband's estate, and which is an equitable debt; though, had it been a legal debt, it might without doubt have been seized by her creditor. Mrs. Jarvis too, ought to have known that the estate was indebted to her, and knowing this she should have instituted her appeal long ago.

I think, after consulting with my brother Judges, that we should not interfere to restore to Mrs. Jarvis a right which she has thus lost. I mean the right to appeal.

The case as to Colonel Jarvis, the other defendant, is different. He does not appear to have known anything of the state of accounts between the executrix and the estate till the matter was investigated in the Master's office, and may well have believed his mother's answer, that the estate owed her nothing. The Master's report was made on the 28th of January last. Colonel Jarvis was only one of several, standing in the same relation as himself; some of these were in England; he desired to correspond with them and ascertain whether they would bear a share of the costs of an appeal. This was not unreasonable. Before he could ascertain this it was too late for the March term, and the next term is in the coming July. The Court at all events, did not sit in March, and have only sat once, in January last, since the decree was made. Colonel Jarvis being a stranger in the matter, and under no obligation to the plaintiff or any of the creditors, unless by the force of their relative legal positions, desires to contest this liability, and my brother Judges think, and I agree with them, that he should have this opportunity, and I therefore give him leave to appeal on payment of the costs of this application, and on the further terms that he brings on the appeal to be heard at the next sittings of the Court, and that, except in so far as the suit may be effected by any order of the Court of Appeal, the proceedings in the Master's office stand, as if an administration order had been had an ordinary administration order.

Mrs. Jarvis's application refused with costs.

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## THE UNITED STATES V. DENISON.

*Costs.—Attorney General.*

The Rule that the Crown neither claims nor pays costs is that which the Court favors as most consistent with the dignity of the Crown, and the practice of the Court,—and where the Crown is made a party in consequence of the discharge of an international duty, and out of courtesy or for form's sake, having no real or substantial interest in the question at issue, and no interest would have suffered, and no loss accrued by the Crown disclaiming or not appearing, the Court will certainly not order costs to be paid to the Attorney General.

The facts appear fully from the judgment.

VANKOUGHNET, C.—This is a petition presented to rectify the Decree in this cause, so far as it ordered the plaintiffs to pay to the Attorney General his costs. The cause was heard before me, and I certainly gave no direction as to the Attorney General's costs. They were asked for at the hearing by Counsel representing the Attorney General; and I expressed, then, the opinion that the Attorney General should not ask for costs, and suggested to his counsel to communicate this opinion to him, and see whether after such an intimation he would still press for them. I do not remember hearing of the matter again until after the decree had been drawn up and entered giving the Attorney General his costs, and execution had issued to levy them. I did not intend that the Attorney General was to have his costs, as a matter of course, merely on asking for them; but I intended that if he persisted in asking for them it would be for me to consider whether I would give him them. The Secretary, in looking at my minute book, seems to have thought that I intended these costs to be given, if the Attorney General insisted on claiming them, and the counsel for the plaintiff seems to have acquiesced in that view. This was a mistake, as no entry in my book in regard to them appears, except this one “The Attorney General asks for his costs.” The Attorney General was made a party to the suit simply and merely because the Government had seized the vessel in question on the apprehension that she was to be used by the

Confederate States of the South in breach of the neutrality laws. In doing this they were only discharging an international duty; they had no interest in the matter, beyond seeing that the vessel was not put to any improper use; and when the bill in this cause was filed by the United States the war was over, and the United States were seeking to obtain possession of the vessel, as having been the property of the Confederate States confiscated to them, against parties claiming to hold the property as the private owners of it. The Government of this country had no longer any interest in the question, and the making the Attorney General a party was a mere matter of form or courtesy, for the object or purpose of the seizure had passed away. The United States Government, though they succeeded in their case, and obtained a decree giving them the vessel, disdained to ask costs, saying through their counsel, that they thought it beneath them as a nation to claim costs in such a contest with a private individual. The Government of this country, acting through the Attorney General, seems to have thought it necessary or justifiable to employ counsel to attend on all the proceedings in the cause, though they had not the slightest interest in them, and have made up their bill of costs amounting to \$349.70 which it is actually claimed should be paid to them by the United States Government. Indeed a writ of execution had been actually issued, against the goods and chattels of the American Consul here, who was joined as a party plaintiff in the cause. The very utmost costs that the Attorney General could claim would be the costs of the formal answer which has been put in, and of a hand brief on attending at the hearing. But I do not think him entitled to any costs at all against the plaintiff. The Government interposed and seized the vessel in discharge of an international duty, which, it is not to be presumed for the honor of the Crown, was undertaken under any threat or dictation of the United States Government; and the course to have been pursued was, under the circumstances, not to have appeared at all in the suit, or to have put in a disclaimer. I can hardly

believe that the Attorney General fully understood the position. The claim for costs is in my opinion unjustifiable and improper; and I order the decree to be amended by striking out the provision for them, and inserting a declaration that the Court does not see fit to make any order as to the costs of the Attorney General. Let the money paid into Court in respect of these costs be returned to the plaintiffs.

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#### STEWART V. HUNTER.

*Practice—Service of decree—Petition of review.*

The Court has jurisdiction in a proper case to entertain an application by a party served with an office-copy of the decree, under the General Orders of June, 1858, (No. 6, Rule 6,) after the expiration of the fourteen days thereby limited.

To support an application after the time limited for leave to file a petition of review, the longer the delay has been and the less satisfactorily it is explained, the stronger the case should be on the merits; and where, after five months' delay, an application was made to impeach the will on which the decree was founded, and the application was supported by affidavits of belief only, in addition to statements which though uncontradicted would not be sufficient to avoid the will, the Court refused the application with costs.

*Mr. McGregor*, on behalf of James Stewart, a devisee of the testator, James Stewart, applied for leave to file a bill to set aside the testator's will, as having been procured by undue influence on the part of the plaintiff, his widow.

*Mr. Hamilton*, for the widow, *Mr. S. H. Blake*, for the executors, and *Mr. Hoskin*, for the infant defendant, contended, that the application should be to the full Court, and by petition, and that it should not be heard now, as so much time had elapsed since the applicant had been made a party to the suit.

*Mr. McGregor*, in reply, referred to *Smith v. Gunn*, a case recently decided in this Court (2 Cham. Rep. 230, and to *Kidd v. Cheyne* (18 Jur. 348).

**MOWAT, V. C.**—This was a motion by James Stewart,

one of the heirs-at-law of James Stewart, deceased, to be discharged from being a party to this suit, and for liberty to file a bill to set aside the will of the deceased, and have the same declared void, on the ground that it was obtained through undue influence on the part of his wife. The estate was at the time in course of administration under the decree in this matter, and in December (1867) the applicant was served with the office-copy of decree on further directions under the General Orders of 1853 (Order 6, Rule 6), as being a legatee under the will for a trifling sum. The present application was made on the 6th June, 1868. Several preliminary objections were made to this application. It was urged that the application should be by petition, and not by motion, but *Kidd v. Cheyne*, 18 Jur. 348, shows a motion is proper. It was further urged that the application should have been made to the Court and not in Chambers. But similar applications have been entertained by us in Chambers, so that a practice to that effect may be considered as established here. In England such applications certainly appear to be sometimes made in Court. See *Kidd v. Cheyne*, 18 Jur. 348; *Thomas v. Rawlings*, 34 Beav. 50; and our order as to Chambers, is not more extensive than the provisions on the same subject in England; if therefore a party chooses to move in Court in such a case, he is not irregular, though his adoption of the more expensive course may be considered in disposing of the costs. Then, it was said that the application cannot be made after the fourteen days limited by the General Order (June, 1853, No. 6, Rule 6). I think the Court has jurisdiction to let a party in after the expiration of fourteen days, though I am not aware of any case that assists me in determining what circumstances entitle a party to this relief. After that time I may safely say, that, the longer the delay has been, and the less satisfactorily it is explained, the stronger the case should be on the merits. Now, here the delay was about five months. No reason whatever is given in respect of the first fourteen days after service of the decree. Some days subsequently,

viz., on the 21st January, the applicant's Solicitor wrote a letter to the Solicitor of some of the defendants proposing a compromise ; to which letter no express answer was given. But I cannot say he was justified in delaying his application on this account for several months, knowing, as he did, that the parties where prosecuting the decree in the meantime. Had a strong case been made out for avoiding the will, this delay might have been of less consequence ; but having read the affidavits, I am of opinion that evidence to the effect of what the deponents state in the affidavits filed in support of the motion, would, even if not met by any counter testimony, be insufficient to avoid the will (see *Williams v. Goude*, 1 Hagg. 577 ; *Constable v. Tuffnel*, 4, *Ib.* 477, 3 Knapp, 122 ; *Lovett v. Lovett*, 1 F. & F. 581 ; *Reece v. Pressey*, 2 Jur., N. S., 380 ; *Stulz v. Schaeffe*, 16 Jur. 909, s). To support the application at this late date something more is necessary than the belief of the applicant and one or two of his friends. It seems from *Thomas v. Rawlings* (34 Beav. 50), that an application of this kind may be renewed on better evidence, such as may be obtained by the depositions of witnesses before an examiner. I do not encourage another application ; but I may say that if another is hazarded its difficulties will be greatly increased if the motion is not made until after the long vacation : I think that under all the circumstances, the present motion must be refused with costs to those parties who opposed it.

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#### GILLESPIE V. GELLESPIE.

##### *Contempt.*

The fact that a defendant had put it an insufficient affidavit on production, is no bar to his moving to dismiss.

A party is not in contempt for noncompliance with an order of Court until the opposite party by some step brings him into contempt ; if such party omits to do this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches.

This was an appeal from the Secretary's order dismissing the bill in this cause.

*Mr. Curran*, for the appeal, argued that at the time of moving to dismiss the defendant was himself in contempt for not complying with the order to produce, and was not therefore in a position to move ; he referred to 1 *Smith's Pr.* 211.

*Mr. S. H. Blake*, contra, contended that the defendant was not in contempt for not making a sufficient affidavit in obedience to an order to produce ; if the affidavit filed was in fact insufficient, plaintiff should have taken some step to put the defendant in contempt before he could claim that he was in that position. For ought that appeared on this motion, the affidavit was sufficient, and it could not be now held to be otherwise. The assumption was in favour of its sufficiency ; he cited *How v. Grey*, W. N. p. 141 of 1867 (May) and 1 *Daniels' Pr.* 556.

VANKOUGHNET, C.—I think the Secretary was right. The defendant is not technically in contempt, though the plaintiff could probably by proper proceedings have brought him into that position. The affidavit of the agent the plaintiff was not obliged to take, though it seems to have given him all the information necessary. It is nevertheless an insufficient compliance with the order ; but, the plaintiff does not come to the Court complaining of this, or obtain an order against the defendant. He allows two sittings to go by, since the affidavit was filed, and does not shew that the want of an affidavit from defendant has in any way prejudiced him. He has not shewn that he is anxious to obtain a decree ; on the contrary, he has been sleeping till awakened by the order to dismiss, which was, I think, properly granted.

Appeal refused with costs.

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## GRANT V. KENNEDY.

*Garnisheeing money ordered to be paid into Court.*

Where money, the proceeds of land belonging to some of the defendants, had been ordered to be paid into Court, to meet a judgment held by the plaintiff against one of these defendants, and the decree directed that the plaintiff should pay to the other defendants their costs of suit—*Held*, that these defendants were entitled to a garnishee order against the money to be paid into Court.

The plaintiff held a judgment against one of the defendants; and the decree directed that some land, of which the judgment debtor had formerly been owner, should be sold to meet the claim, and the purchase money paid into Court. The decree also ordered the plaintiff to pay to some of the other defendants their costs of the suit. These costs had been taxed, and execution issued against the goods and chattels of the plaintiff, in order to collect them. This writ had been returned “*nulla bona*,” and another writ was then issued against the plaintiff’s lands.

Before the day appointed for the sale of the land, *Mr. McGregor*, on behalf of the defendants who were to get their costs, moved for a garnishee order against the money directed to be paid into Court. He contended that the Act which abolished imprisonment for non-payment of money, gave the creditor the same right to garnishee in this Court that he has at law. (C. S. U. C. ch. 24, secs. 13 & 15.)

*Mr. Hodgins*, for the plaintiff, stated that there was a prior lien on the money, which might exhaust the whole sum.

*Mr. McGregor*, admitted that such was the case, but asked for the order, subject to the lien.

THE SECRETARY, after referring to the authorities, granted the order.

## STREET v. O'REILLEY.

*Extending the time to pay mortgage money.*

Where the day to pay money reported due on a mortgage was past, the Court allowed the mortgagor six months further time to redeem, on condition of paying the costs of the motion, and interest on the whole sum found due, it appearing that the security was good, and the mortgagor in a fair way to raise the money.

*Mr. McGregor*, for the defendant, applied for an extension of time to pay the money reported due to the plaintiff, in this cause, which was a suit for foreclosure. It appeared that the mortgaged premises were a good security for the amount due, and that the mortgagor had been active in endeavouring to raise the money due, with every reasonable prospect of success.

*Mr. R. Graham*, for the plaintiff, opposed the motion. He stated that the interest was only six per cent, and contended that if any further time was granted to the defendant, it should be only on condition of his paying eight per cent. on the whole amount reported due.

THE SECRETARY granted an extension of time for six months, on terms of paying the costs of the motion, and six per cent. on the whole sum reported due, including interest and costs, upon the authority of *Brewer v. Austin*, (2 Keen, 211), and *Whitfield v. Roberts* (7 Jurist, N. S. 1268.)

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## SCHREIBER V. FRASER.

*Creditors' suit—Rights of creditors who had not signed deed of assignment.*

In a suit instituted by a creditor of the estate of a deceased debtor who had made an assignment for the benefit of his creditors, certain other creditors who had not signed or accepted the deed of assignment, sought to come in under the decree and partake of the benefit of the trusts. The trust deed had been made in 1857. The assignor had died in 1863—the assignment was to be executed by the creditors within two months of its date. The accountants declined to receive proof of the claims; and an application in Chambers for leave to come in and sign the deed, and participate in the residue of the estate was refused.

This was an application made on behalf of Torrance and Cramp, for leave to execute the deed of assignment made by the late John Hutchinson, for the benefit of his creditors, and to be allowed to come in and prove their claim under the decree in this cause. The facts are as follows: John Hutchinson, on the 28th of December, 1857, executed a deed of assignment of all his estate to the defendants, Fraser and Cameron, for the benefit of his creditors. This assignment was to be executed by the creditors within two months after date, with power to the trustees to extend the time. The assignment contained a clause whereby all the creditors who should sign the deed should accept the trusts of the assignment and the benefit thereof, in full of their claims, and that they should not sue or bring any action in respect of their claims against Hutchinson. Hutchinson died sometime in 1863.

The bill in the present case was filed by a creditor, to wind up the trust estate, and the decree made therein directed the estate to be wound up and the creditors entitled to the benefit of the trust deed to prove their claims before the Accountant. The applicants never executed the deed of assignment, and on the 13th of July, 1869, they recovered a judgment against Hutchinson for the amount of their claim and issued a writ of *f. fa.* against his goods. They brought their claim into the Accountant's office, but the Accountant declined to entertain the same because they had not executed

the trust deed, and the present application was made for leave to sign the deed and participate in the residue of the estate.

*Mr. G. M. Rae*, for the applicants, contended that they were entitled to the benefit of the trusts, as they had not taken any active steps against the trust estate, and in any event that the [unreported] case of the *City Bank v. Scatcherd*, decided in this Court, on re-hearing, was an authority in his favour, as shewing the claimants entitled now to execute the deed and participate in the residue.

*Mr. A. Hoskin*, for trustees, contended that after so long a delay the applicants ought not to be allowed to sign the deed ; that the applicants, having recovered judgment, and issued execution after the deed of assignment, was alone sufficient to debar them from any benefit themselves. In any event, that the trust deed containing a release to Hutchinson and a covenant not to bring any action against him, it must be considered that such release and covenant was a part of the consideration for which he made the assignment, and, he being now dead, he could derive no benefit from the applicant's release and covenant. That in the *City Bank v. Scatcherd* cited on the other side, no such release was contained in the trust deed. The following cases were cited : *Joseph v. Bostwick*, 7 Grant, 332 ; *McKay v. Farish*, 1 Grant, 333 ; *Watson v. Knight*, 19 Beav. 372 ; *Field v. Lord Donoughmore*, 1. D. & W. 228, S. C. in appeal ; *Collins v. Reece*, 1 Coll. 678 ; *Gould v. Robinson*, 4. D. & S. 509 ; *Bush v. Shipman*, 14 Sim. 243 ; *Lane v. Husband*, 14 Sim. 556.

*Mr. Edgar* appeared for the infant heirs of Hutchinson.

*Mr. Sullivan*, for the plaintiff.

A case of *Jacques v. Foster*, decided by Vice-Chancellor Mowat [unreported] was mentioned, in which it had been held that a creditor may sue the assignor, and still take the benefit of the trust deed where the trust deed contains no release.

MOWAT, V. C., dismissed the application, but without costs, all parties acquiescing in the question of costs being so disposed of.

## JEFFS v. ORR.

*Dismissing Bill.*

The Court will exercise a discretion in granting or refusing an order to dismiss and consider the peculiar circumstances of the case.

Where, therefore, the defendants had been dilatory in obeying the order to produce, and refused to go down to hearing by consent, when plaintiff being too late to go down otherwise, applied for a consent, an order to dismiss was refused, and under the same circumstances an order to open publication and for leave to set down cause for the following examination and hearing term granted.

*Mr. Moss* moved to dismiss the bill for want of prosecution. The bill had been filed 4th August, 1867, was served on the defendants now moving on the 7th August, 1867. The answer of one of the defendants was filed the 22nd of October, 1867, and the answer of the other filed 14th November, 1867. Replication was filed 17th March, 1868, The plaintiff took out and served the usual order to produce on the 6th April, 1868, and afterwards examined the defendants on their answers. The defendants did not comply with the orders to produce until nearly three weeks after service, but had asked the plaintiff's Solicitor for time. The plaintiff had completed the examination of the defendants and was ready to go to hearing by 5th May, 1868, too late, however, for the then next ensuing sittings which commenced on the 12th May. He applied to the Solicitor of one of the defendants for his consent to go down to hearing at that term, which he refused.

*Mr. Spencer, contra.*

THE SECRETARY refused the motion. Costs to be costs in the cause.

While the above motion was standing for judgment, Mr. Spencer moved on behalf of the plaintiff for an order to open publication, and for leave for the plaintiff to set down the cause for the next examination and hearing term. He cited *Rice v. George*, 2 Cham. Rep. 74; *Upper Canada Mining Co. v. The Attorney General*, 2 Cham. Rep. 207.

*Mr. S. H. Blake* and *Mr. Moss*, contra, referred to *Mulholland v. Brent*, 2 Cham. Rep. 31; *Gillespie v. Gillespie*, 2 Cham. Rep. 267.

THE SECRETARY granted the application.

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### HEWARD V. SCOTT.

*Dower—Release by married woman—Form of deed.*

Where after a husband's estate had been transferred to A., a purchaser, his wife executed a deed to A. containing a release of dower by her, but no words of release or conveyance by the husband:

*Held*, sufficient to bar the wife, without examination before magistrates or a Judge.

*Mr. Cattanach*, for the plaintiff, the vendor, submitted a release of dower, to complete a title.

*Mr. Murray*, for Walsh, the purchaser, objects to it in point of form. The legal estate in the lands, which had been invested in Scott, was vested by order of the Court in Walsh. But there was no release of dower. By a subsequent deed, in which Scott, the husband, joined, Mrs. Scott released her dower by ordinary conveyance without examination or certificate, as required in the case of married women in parting with their estate in lands. There were no words of conveyance or release by the husband.

*Mowat*, V. C., held, on the authority of ch. 84, Consol. Stat. U. C., secs. 4, 5, 6, and 10, and sec. 19, ch. 40, 24 Victoria (1851), that the release is sufficient, and that the purchaser is bound to accept the same.

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### BRADLEY V. McDONELL.

*Act for Quieting Titles—Correction of mistakes.*

Where it was shewn that an erroneous certificate had been issued, but not registered, and no deed or encumbrance since made affecting the land, a motion on petition that a proper certificate issue was granted *ex parte*.

A sale had been made to Mr. James Paterson of the mortgaged premises, subject to the plaintiff's shewing a good

title under the Act; upon proof of title and payment of the purchase money agreed on, it was ordered that a deed should be issued vesting the premises in the purchaser.

The title had been made, a certificate in form set forth in Schedule D of the act, vesting the premises in the plaintiff, was issued instead of a deed in form of Schedule E, in favour of the purchaser.

The plaintiffs now applied by petition, stating the error, shewing that the certificate of title had not been registered, and no conveyance or encumbrance made or effected by the plaintiffs, and praying that the premises might be vested in the purchaser by the statutory deed in form of Schedule E.

*Mr. Hamilton* for the petitioners.

MOWAT, V. C., granted the application.

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WALLBRIDGE v. MARTIN.

*Practice—Parties.*

When a judgment has been recovered *pendente lite* it is not necessary to make the judgment creditor a party.

The question of parties was raised on appeal from the Master's certificate, when the following judgment was delivered by

SPRAGGE, V. C.—It is decided in the case of *Massey v. Batwell*, 5 Irish Equity, 383, and *Trye v. The Earl of Albborough*, 1 Irish Equity, 2 N. S. 666, and by other cases which preceded them, that where a judgment has been recovered *pendente lite* it is not necessary to make the judgment creditor a party, such judgment creditor standing upon the same footing as a voluntary assignee of the mortgagor. In *Wood v. Surr*, 19 Beav. 551, Sir John Romilly expressed the opinion that when a mortgagor is made insolvent, and an assignee is appointed *pendente lite* the assignee

should be made a party, he being not a voluntary purchaser but appointed in an adverse proceeding against the mortgagor. It was not necessary to decide the point, the Master of the Rolls holding that no one but the assignee could make the objection. The principle upon which an assignee by voluntary assignment is not a necessary party is stated to be that if the rule were otherwise a mortgagor might by repeated alienation *pendente lite*, make it impossible for the mortgagee to obtain his decree of foreclosure; and in one case it is suggested that a mortgagor might by confessing judgment to his friends *pendente lite*, obtain the like result; I suppose it is meant fraudulently and without the existence of debts to justify the confessions; at all events it seems to be established that the *conusee* of a judgment recovered *pendente lite* is not a necessary party. I confess my impression had been that this proceeded upon the principle that *lis pendens* is notice, and as by our Provincial Statute 18 Victoria, chapter 127, the mere pendency of a suit in this Court in which any title or interest in lands is brought in question, is not notice, but registration is required to make it notice, that if these judgments have been recovered, and writs placed in the Sheriff's hands before registration of the suit, or if there was actual notice that it was pending, the judgment creditors would be proper parties. It is suggested by Mr. Fisher in his treatise on the Law of Mortgages, page 221, that since the passing of the Imperial Act, 2 and 3 Victoria, chapter 11, a purchaser *pendente lite* without notice, would not be bound before registration. The language of the Imperial Act varies somewhat from ours; still I should have thought it a point which should not be decided against the judgment creditor in his absence, but for the case of *Bellamy v. Sabine* (3 Jurist, N. S. 943: see also *Tyler v. Thomas*, 25 Beav. 47,) in which it was held by Lord Cranworth and Lord Justice Turner that the doctrine in relation to alienation *lis pendens* is not founded upon actual or constructive notice. I must hold, therefore, that the judgment creditors referred to in the Master's certificate, ought not to be made parties to this suit, as directed by the Master.

## ARCHIBALD v. HUNTER.

*Amending bill.*

A plaintiff will be allowed to amend even after the expiration of twenty-eight days from filing the answer, where such plaintiff has been delayed by the defendants not obeying the order to produce within proper time.

In this case the plaintiff had served the usual order to produce upon the defendants on the 6th of April. The affidavits had been filed by some of the defendants on the 15th and 18th of April, and by the remaining defendant on the 23rd of September.

On the 2nd of October, *Mr. S. H. Blake* moved, upon notice for leave to amend the bill of complaint generally, or in the manner set out in his notice. He contended that he should be allowed to amend generally, as, if the defendants had filed their affidavits or production in good time, the order to amend could have been had upon *preceipe*; and that as the necessity for the motion had been occasioned by the delay of the defendants in filing their affidavits, they should pay the costs of the motion.

*Mr. A. C. Chadwick*, for the defendants, argued that the general orders confined the plaintiff to the amendments set out in his notice, and that a general amendment should not be allowed; that the amendments proposed would make a new case; and that if the bill was so amended, it would be in an improper alternative. The plaintiff had not proceeded with proper diligence, and had not fully accounted for his delay in making the motion.

THE SECRETARY, after taking time to consider, gave judgment as follows:—

I think the plaintiff should have leave to amend. It is sworn that he could not amend until the defendants had complied with the order to produce, and though two of them filed their affidavits in April, the third, appearing by the same Solicitor, did not file his until September. The word-

ing of the order as to allowing amendments after the expiration of twenty-eight days from the filing of the answer, does not, I think, stand in the way of my giving the plaintiff such an order. The power of the Court to extend the time for doing any act is expressly saved by the General Orders, and I am only putting the plaintiff in the position he would have been in had the defendants all obeyed the order to produce within the proper time. The costs should be costs in the cause. I do not give them to the defendants as their default has rendered the application necessary, and I do not give them to the plaintiff as he did not take active steps to enforce the production.

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#### McEWAN v. ORDE.

##### *Setting aside order.*

An *ex parte* order will not be set aside because it is not entered.

*Mr. Smart* moved to set aside order of the Secretary, granted *ex parte*, on the ground that the order had not been entered as it was contended it should have been, being an *ex parte* order, under order 121, February, 1865.

*Mr. A. Hoskin*, contra.

**THE CHANCELLOR.**—This is no ground for setting aside the order. The order could not be entered before it was an order. The entry of it must be a subsequent act, and non-entry, therefore, would be no ground for setting aside an order well made.

The motion must be refused with costs.

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**ATTORNEY GENERAL v. CASEY.***Supplemental answer.*

Motion for leave to file a supplemental answer must be made in Court.

*Mr. Edgar*, for the defendant, moved on notice for leave to file a supplemental answer, and referred to *Churton v. Frewen*, 1 L. R. Eq. Cases, 238, where a similar application in Chambers was refused on the ground that the motion should have been made in Court. The question to be decided was, whether the old practice of applying in Chambers in these cases (*Cherry v. Morton*, 1 Cham. Rep. 25), has not been overruled by the above English decision.

THE SECRETARY, after consulting with the Judges, held that the motion must be brought in Court under the authority of *Churton v. Frewen*.

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**GAINER v. DOYLE.***Documents in custody of Deputy Registrar.*

Where documents are in the custody of the Deputy Registrar in another cause, and are required at the hearing, an order for their production will be granted *ex parte*.

Under an order to produce documents issued in a certain case of *Corrigan v. Corrigan*, certain documents had been produced and deposited with the Deputy Registrar at Goderich by a defendant who was also a defendant in the present case. In an affidavit in production, filed in this suit by the same defendant, he referred to the same documents as being not now in his custody, but in the custody of the Deputy Registrar.

*Mr. T. H. Spencer*, for the plaintiff, now moved *ex parte* on an affidavit of the plaintiff's Solicitor, that it was in his

belief material and necessary that the said documents be produced as evidence for the plaintiff at the hearing of the cause, for an order that the Deputy Registrar do produce said documents at the examination and hearing of this cause at Goderich.

THE SECRETARY granted the order asked for.

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#### McEWAN v. ORDE.

##### *Postponing hearing.*

When a motion to postpone the hearing of a cause was made before the Secretary on the same day the cause was to be heard in an outer County, he refused the application.

*Mr. Fletcher* moved to postpone cause set down for examination and hearing at Lindsay before the Chancellor to-day. The ground of application was the absence of Mr. Hector Cameron, a necessary and material witness. The affidavit read on behalf of motion shewed that Mr. Cameron would not sail from England till to-day; that proceeding without him would or might damage the defendant's case; that the motion was made in good faith, &c.

*Mr. A. Hoskin*, contra, contended that Mr. Cameron could not, if here, be received as a witness on account of interest; that it was absolutely necessary to go on.

THE SECRETARY.—I do not think I should make any order postponing the hearing. No further costs will be incurred by allowing the cause to come on. It is set down for the Lindsay circuit, which commences this very day, and it is the first case on the list. When the cause is called, if the Chancellor postpones the cause he may do so, or he may allow it to proceed, taking the evidence of witnesses now in attendance, and postponing the hearing if he thinks proper till after Mr. Cameron's evidence can be taken.

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## CAMERON V. BAKER.

*Substitutional service.*

The administrator of a deceased mortgagee having filed a bill against his heirs-at-law, one of whom lived abroad, in some unknown place, it was ordered that service of the bill on a sister of the absent defendant, and posting to him a copy of the order, addressed to the place where he had been last heard from, be deemed good service.

In this case the plaintiff was the administrator of a deceased mortgagee who had died intestate, leaving several infant children; and the bill was filed for the purpose of foreclosing the heirs and heiresses-at-law of the mortgagee, in order that the administrator might be enabled to give a good title to the land, the Statute making no provision for such a case.

It appeared from the examination of Mrs. Baker, one of the mortgagee's children and a defendant in the suit, that one of her brothers who was also a defendant and of age, had resided, several years ago, at William's Creek, in British Columbia, but that nothing had been heard of him or from him for several years. She believed, however, that he was still alive. The plaintiff applied for an order for substitutional service on the absent defendant, whose interest in the property was evidently the same as that of the other defendants who resided within the jurisdiction.

*Mr. McGregor*, in support of the application, read the examination of Mrs. Baker, and also an affidavit of the plaintiff setting out the facts, and stating that he was only administrator, and had no personal interest in the property.

THE SECRETARY, after looking into the authorities, made an order, directing service of an office-copy of the bill on Mrs. Baker (who is of age), and posting a copy of the order, addressed to the absent defendant at William's Creek, and allowing him six months to answer or demur.

**McDONALD v. McMILLAN.***Substitutional service.*

Where a mortgagee filed a bill for foreclosure against a mortgagor, who resided out of the jurisdiction, and whose residence was unknown, whilst the security was scanty, service was ordered on the mortgagor's wife.

McDonald, the plaintiff, held a mortgage on some land of the defendant McMillan's, and filed his bill to foreclose. McMillan resided in the United States, and upon his wife being examined, it appeared that he had no fixed residence, and that he was sometimes in Pennsylvania, and sometimes in Michigan. Mrs. McMillan further stated, in her examination, that she did not know where her husband then was.

*Mr. McGregor* applied for an order for substitutional service on Mrs. McMillan, and besides her examination, he read an affidavit of the plaintiff, shewing that the value of the mortgaged premises was less than the amount due to him on it.

THE SECRETARY made an order as moved for, and allowed the defendant three months to answer or demur to the bill.

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**CARPENTER v. THE CITY OF HAMILTON.***Practice—Waiving irregularity of service.*

Where after an irregularity of service the party having the right to insist on it, serves a demand which it would put the other party to expense to fulfil, it waives the irregularity.

In this suit the following point arose on a motion for injunction :

*Mr. Roaf*, Q. C., objected that no sufficient notice of the motion had been given to the Great Western Railway Company.

*Mr. Blake*, Q. C., in answer, read affidavits that Mr. Swinyard, the General Manager of the railway, had been duly served with notice of the motion on the 7th, and that the Bill was also duly served upon him upon the following day. Mr. Blake also produced a copy of a demand for the affidavit, filed in support of the motion, which had been served upon the plaintiff's solicitor by the agents of the railway solicitors, and insisted that the service of this demand was a waiver of the irregularity (if any) in not serving the bill with the notice.

THE CHANCELLOR observed that his recollection of the practice was, that if, after an irregularity in service, the party having the right to insist upon it, served a demand which it would put the other party to expense to fulfil, the former party would not be allowed to insist upon the irregularity. And after consulting the Secretary as to the practice, his Lordship decided that the service of the demand for affidavits was a waiver of irregularity in serving the bill.

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#### RICHARDS v. RICHARDS.

##### *Order 144, Consolidated Orders.*

A motion under this order to have the bill taken *pro confesso*, will not be granted *ex parte*.

*Mr. Rose* moved, *ex parte*, under order 144 of the Consolidated General Orders, which reads as follows :

"A person refusing or neglecting to attend at the time and place appointed for his examination, or refusing or neglecting to obey an order for production of documents, may be punished as for a contempt; and the party who desires the examination, or production, in addition to any other remedy, to which he may be entitled, may apply to the Court upon motion, either to have the bill taken *pro con-*

*confesso* or to have it dismissed, according to circumstances," to have the bill taken *pro confesso* on the ground that the defendant had neglected to attend before the special examiner when required.

Mr. Rose produced the certificate of the special examiner of the defendant's default, and referred to *Prentis v. Bunker*, 4 Grant's Reports, 147, as warranting the order *ex parte*.

THE SECRETARY.—The report of *Prentis v. Bunker* does not shew that the application was *ex parte*, and I am given to understand, and have no doubt it was on notice, at any rate it is still discretionary in the absence of an express order, and I refuse to grant such a motion *ex parte*.

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#### DONOVAN v. DENISON.

*New hearing—Solicitor and client.*

Where the defendant's Solicitors, through the neglect of their clerk, were not aware until after the hearing that the cause had been set down or notice of hearing served, and the question raised by the answer was as to the defendant's liability on a judgment recovered against him by his Solicitor, the Court allowed a new hearing after the decree was drawn up and entered, on payment of costs.

The application for such a purpose should be by petition to the Court, and not by motion in chambers.

The plaintiff was assignee of a judgment recovered by Donald A. McDonald against the defendant, Charles L. Denison, for \$610.62, damages and costs, and on the 16th January, 1867, placed in the Sheriff's hands a writ of *fi. fa.* against his lands. The defendant was also entitled to certain residuary real estate under his father's will, which was vested in Trustees, and to obtain equitable execution in respect thereof the plaintiff filed his bill in October, 1867. The defendant by his answer set up, amongst other things, that the judgment was recovered by Mr. McDonald as trustee for the present plaintiff; that it was recovered on a note

given to the plaintiff for costs incurred and to be incurred, but no bill of these costs had been rendered ; that the relation of attorney and client existed between the parties until after the time the judgment was recovered ; that the defendant did not owe costs to the amount of the note, and that he was entitled to certain credits which he had not received.

The cause came on at the Spring sittings of the Court at Toronto, in 1868, and the defendant not appearing the Court made a decree declaring that the plaintiff was entitled to a lien on the defendant's share of the testator's estate, to the extent of the amount payable under the judgment for debt and costs, and it was referred to the Master to take the necessary accounts. The defendant being also entitled to certain residuary personal effects, the plaintiff, under the recent law permitting executions against goods and lands to issue simultaneously, in April, 1868, issued and deposited with the Sheriff an alias *fi. fa.* goods, in respect of the said judgment. In June, 1868, the plaintiff applied, by petition, for an order enlarging the scope of the decree, by directing the Master to take an account of the residuary personal estate to which the defendant was entitled, and which was applicable to the payment of the plaintiff's claim.

On the petition coming on to be heard before Mr. Vice-Chancellor Mowat, the defendant set up the matter contained in his answer to the bill ; but the Judge was of opinion that he was concluded by the decree, and that it was necessary to apply for a new hearing of the original cause. The defendant accordingly applied by way of motion, supported by affidavits, shewing how the omission to appear at the original hearing arose. It appeared that the notice of hearing was served on a clerk of the plaintiff's solicitors, and he, through inadvertence, made no entry thereof in the office diary, and the Solicitors and their other clerks knew nothing of the cause having been set down and notice of hearing served, until after the hearing had taken place and the decree had been pronounced.

The motion was made in chambers, the petition for the supplemental order came on the same day in Court.

*Mr. R. Sullivan*, in both applications, for the defendant.

*Mr. S. H. Blake* for the plaintiff.

MOWAT, V. C.—It appears that the explanation given of not having appeared at the hearing last Spring would at law be held sufficient ground for a new trial on payment of costs. *Nash v. Swinburne*, 3 M. & Gr. 630; *Cannan v. Reynolds*, 5 El. & Bl. 301. And I think, as the application was made in time for the hearing this Autumn, I should not, under the circumstances of the case, deal more severely with the defendant than a defendant at law is treated.

I have delayed giving judgment for the purpose of considering a variety of points on some of which on the present evidence I have felt considerable difficulty; but as the conclusion to which I have come is, to allow a new hearing of the original cause, the parties will have another opportunity of discussing the questions which the case may involve. For the present purpose it is sufficient to observe that no over-charges are specified by the defendant, but that, on the other hand, no bill has been rendered to him so that a specification of overcharges is impossible. See *Re Harper*, 10 Beav. at 291, *Re Blackmore*, 13 Beav. 154. *Re Ingle*, 21 Beav. 275. A client is, generally speaking, entitled to a bill of the costs charged against him, notwithstanding payment. *Re Blackmore*, 13 Beav. 154; *Re Newman*, 30 Beav. 196; and a lapse of twelve months after payment is not always a bar to a suit against a Solicitor for an account, though the summary process provided by Statute may not then be open to the client; *O'Brien v. Lewis*, 9 Jur. N. S. 321; *Barwell v. Brooks*, 8 Beav. 121; Morgan and Davey on Costs, 330. Whether what took place amounts to payment, within the meaning of the Statute, may be a question: *Sayer v. Wagstaffe*, 5 Beav. 415, 423; *Re Currie*, 9 Beav. 602; *Re Harper*, 10 Beav. 284; *Re Drake*, 22 Beav. 438; *Re Harrier*, 13 M. & W. 3; *Re Boyle*, 5 DeG. M. & G. 540; *Re Bateman*, 2 Ib. 359; and if it does, whether the lapse of time is great enough, under the circumstances, to operate

as a bar to a suit, as well as to the summary proceeding, may also be open to argument; *Turner v. Hand*, 27 Beav. 561; *Blaggrave v. Routh*, 2 K. & J. 509; S. C. 8 De G. M. & G. 620. Delay, during the existence of the professional connection between the parties, is of less consequence than delay after their relations ceased; but is not wholly immaterial. *Blaggrave v. Routh*, 2 K. & J. 509; *Shaw v. Drummond*, 13 Gr. 662. These points were but slightly argued before me; and some of them may demand fuller discussion when the case comes on again.

Assuming, as both parties did on the argument before me, that the defence set up by the answer to the original bill cannot be brought forward in the Master's office in reduction of the amount claimed, (see *Penn v. Lockwood*, 1 Gr. 350; *Sackett v. Bassett*, 4 Madd. 58), neither could it be set up in the supplemental suit as long as the original decree stands. *Eastmure v. Laws*, 5 Bing. N. C. 444.

I think the application for a new hearing should have been by petition, and should have been made in open Court and not in Chambers; but as the objections to the form and place of the application are purely technical and (considering what previously took place before me) have no merit in them, and as such applications have been made by motion in Chambers in other cases without objection by the opposite parties, though I am obliged to yield to the objections now that they are made, I cannot give the plaintiff costs, and the defendant must have liberty to present a petition now, to be served on Wednesday, returnable on Thursday in Court. This may press somewhat hardly on the plaintiff; but as the motion was made before vacation, the defendant, as I decide in his favour, should not be prejudiced by my delay in giving judgment.

If the defendant waive his objections to the form and place of the motion, I shall grant the application for a new hearing; costs of the former hearing and of the motion to be paid by the defendant to the plaintiff; the defendant consenting to a hearing on the original pleadings and on the petition, if the plaintiff wishes, at the present Toronto sit-

tings, and to accept twenty-four hours' notice of such hearing. I am bound to give the plaintiff the costs mentioned, if he requires them, though as they may have to be made good to the defendant by his Solicitor, the negligence of whose clerk has occasioned the whole difficulty, the plaintiff may, perhaps, not care to insist on his right to the costs. The answer to the original bill will stand as the answer to the petition; and I shall reserve the costs of the petition and of the application thereon, to be disposed of on the hearing before the Chancellor.

Besides the questions discussed before me, and those to which I have alluded, the case on the petition involves the same point as was lately discussed in the Court of Appeal in *Jarvis v. Blake*.

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#### IN RE FITCH.

*Taxing Solicitor's costs between Solicitor and client—Scandalous matter in affidavit.*

An order to tax a Solicitor's bill is not to be granted *ex parte* on the application of the Solicitor where there appear to be any facts in dispute between him and the client. It is the duty of the Solicitor applying to make known such facts to the Court, and if he does not the order will be set aside.

Motions for taxation under such circumstances should be on notice, and the reference should, as a rule, be to the Master at Toronto, although in special cases such rule may be departed from.

Where the affidavit, on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the Solicitor altogether unconnected with the dealings between the Solicitor and the client, such allegations were held to be scandalous, and were ordered to be struck out of the affidavits.

This was an application to set aside an order obtained by the Solicitor for the taxation of his bill of costs.

*Mr. S. H. Blake*, for Mitchell, who applies.

*Mr. J. A. Boyd*, for Fitch, the Solicitor.

*Mr. Blake* put in the correspondence with a view of shewing that the retainer was by Rathburn, not by Mitchell;

and he contended that the present order settled the question of retainer, which it should not have done, especially as the order was granted *ex parte*. That the question of retainer was a disputed fact, it being alleged that the Solicitor had agreed to charge only his costs out of pocket. He objected also that the reference was made to the Master at Brantford, whereas in a matter of this nature it should have been made to the Master at Toronto; and where questions, such as those appearing here, are at issue, the order should not have been granted *ex parte*, but should have been on notice and the directions and conditions which he contended were necessary to do justice between the parties could have been given in the presence of both parties; the practice in similar cases had, he said, always been to give notice. He referred to *Re Thurgood*, 19 Beav. 541; *Holland v. Gwynne*, 8 Beav. 124; *Re Congreve*, 4 Beav. 36; *De Feucheres v. Dawes*, 11 Beav. 46; and contended that there was no retainer proved as far as Mitchell was concerned; that Mitchell was an illiterate man, and had no interest in the matters in litigation. Rathburn had made use of Mitchell for his own purposes. The correspondence was with Rathburn, and he was the beneficial plaintiff, as was well known to the Solicitor. He urged also that it was in evidence that Mitchell repudiated any liability as soon as he found that his name had been used in any other than a formal manner. The letters of the Solicitor shewed a strong case against him, as far as Mitchell was concerned. With regard to a retainer it must be clearly shewn. *Re Geddes v. Carroll*, 1 Cham. Rep. 263. Further, the Solicitor does not produce his books, shewing who he had charged as clients. In his letter to Rathburn, 11th February, 1868, the Solicitor charges Rathburn with the costs; and the costs of the taxation are also charged to Rathburn. It is not shewn that Rathburn was Mitchell's agent, and it was not so alleged; and no claim was made against Mitchell until recently.

*Mr. Boyd*, contra, referred to the terms of the notice of motion to shew that no objection was taken to the reference being made at Brantford, and contended that the question

of retainer was not concluded by the order usually obtained by a client, and the present order was properly granted on the application of the Solicitor *ex parte*. It was open to the Master to consider the question of retainer if disputed. He referred to Danl. 1711; 1 Smith Pr. 133-6, 147.

*Mr. Blake* referred also to Morgan & Davy, page 313; *Re Bracey*, 8 Beav. 266.

**SPRAGGE, V. C.**—I did not call upon Mr. Blake to reply, being satisfied that the order ought to be set aside independently of the merits. The order concludes the clients upon the question of retainer, and was obtained *ex parte* and without disclosing the fact that that question was emphatically the question between the Solicitor and his alleged client. That is, of itself, sufficient to set aside the order. I said, likewise, that the order was irregular in directing the taxation to be at Brantford, instead of Toronto. I have since been told, however, by the Secretary, that my brother *Mowat* has, in some cases, directed the taxation of costs between Solicitor and client to be before a local Master. I express no opinion upon the merits, as the Solicitor proposes to answer all charges of misconduct in relation to the matter in question whether nearly or remotely connected with it. I observed that the affidavit contained charges of misconduct against the Solicitor, unconnected with any dealings between him and this client, and the reasons given for introducing these charges is, that they shew him to be a man capable of the misconduct charged in his dealings with the client.

I hold that they are not receivable upon this ground, nor upon any other that I can conceive; the introduction of such matter is, therefore, what the Court holds to be scandalous; and I shall direct the Registrar to look through the affidavits, in order that affidavits containing such scandalous matter may be taken off the files. I have said nothing as to costs. I think there should be no costs to either party.

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**IRWIN v. LANCASHIRE INSURANCE COMPANY.**

*Time for answering.*

The time for answering is not changed by the Consolidated Orders. The period is four weeks, not a calendar month. A foreign company having an office in Montreal and another in Toronto, an office-copy bill, with an endorsement to answer in four weeks, served on the agent in Toronto, was held sufficient service.

*Mr. Hamilton*, for the defendants, moved to set aside service of the Bill, and for further time to answer.

The defendants are a foreign corporation, having an agency in Toronto and one in Montreal. He urged that the Bill should have been served in Montreal; or, at all events, that the defendants should have had six weeks to answer, as the matters in question in the suit took place in Montreal: that in any event the endorsement on the Bill of four weeks was wrong; and that it should have been a calendar month. He read portions of the Act applying to Insurance Companies (23 Vic. ch. 33), and cited *Young v. Wilson*, 2 Cham. Rep. 56. He contended that the agent in Upper Canada was not a general agent, and had no power to affix the seal of the Company to any document.

*Mr. T. H. Spencer* opposed the motion. He contended that the defendants were properly served in Ontario, citing *Con. Orders* 88, 90, 91, 92; *Howland v. Grierson*, 5 U. C. L. J. 19; and argued that no objection was taken by the notice of motion as to the place of service. That the defendants being properly served in Ontario had only four weeks to answer, notwithstanding the language of the Consolidated Orders, and that the Statute 23 Vic. had no application to the question.

THE SECRETARY refused the motion, with costs.

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**THE SAME CASE, ON APPEAL.**

*Mr. Hamilton* applied for time to answer, and appealed from the decision of the Secretary, on the grounds:—

1st. That at least a calendar month should have been the limited time for answering. 2nd. That as the transaction out of which the suit arose took place in Lower Canada, six weeks should have been given. 3rd. That 23 Vic. chap. 33, sec. 5, must be taken to affect the rules of this Court. The principle was, where service is made on an agent that sufficient notice should be given to communicate with the principal. That Clarke, on whom the service was made, was not such an officer as was contemplated in the General Orders as to service. The present case was analogous to cases of moving to dismiss by one defendant where several others could not be served. He urged also that the affidavit of merits was, under the circumstances, sufficient to explain delay and to afford grounds for extending the time.

*Mr. Spencer*, contra, contended that the Order and the Schedule must be read together, and that, thus taken, they shew conclusively that four weeks is intended; and no change of practice has taken place. That in reality, however, more than a calendar month elapsed before the order *pro con.* was taken. He argued that the true test as to the limit of time to be allowed was not, where the transaction took place, but where the bill was served: that as the Order *pro con.* is not moved against, it and all previous proceedings must be held to be regular. That it was too late to apply for time; and that 23 Vic. is enacted as a safeguard to the public, and has no bearing on the orders.

The Con. Orders 88, 90, 91, 92, *Howland v. Grierson*, 5 U. C. L. J. 19, was referred to.

SPRAGGE, V. C., dismissed the appeal, with costs.

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**IRWIN v. LANCASHIRE INSURANCE COMPANY.**

*Leave to answer after pro con.*

Where service has been effected on an agent, and it can be shewn that the time allowed for answering is insufficient to enable him to communicate with his principal and to get in the answer, on an affidavit of a good defence on the merits a defendant will be granted leave to file his answer, although an order *pro con.* has been taken.

In this case, the circumstances of which, as far as they affect the question of practice, appear from the foregoing Report.

*Mr. S. H. Blake*, for the defendants, moved for leave to file the answer, supporting his motion by an affidavit that the defendants had a good defence on the merits, and verifying the allegations contained in the answer.

*Mr. Spencer*, contra.

**THE SECRETARY.**—The defendants should have leave to file their answer in this case. It is sworn that they have a good defence on the merits, and when that is the case the Court will always endeavour to allow an opportunity of setting up the defence. The order is not so objectionable as is submitted for the plaintiff. The defendants could not have answered in the time allowed by the endorsement on the bill, and if they had applied in Court an extension of time would have been granted, so that the plaintiff could not have got down at Goderich. On the former application I would have allowed the defendants to answer if I could ; and had the answer been verified on the application I would have done so. I allow the answer to be filed, on payment of 20s. costs, and the costs of noting *pro con.*

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## PRICK V. BUCKE.

*Lands descended to heirs-at-law liable in the hands of a purchaser at Sheriff's sale, with notice, for the debts of the ancestor.—Order to revive.*

Where a debtor dies intestate, and his lands are sold under execution against his heir for the private debt of the heir, and the purchaser has notice before his purchase that there are debts of the ancestor's outstanding of which the creditors claim payment out of the land seized, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts.

When a suit becomes defective, and is proceeded with without an order of revivor being taken out, a subsequent application, by petition, to supply the defect by adding parties, is not improper; but the new parties may not be bound by the proceedings had in their absence.

*Mr. Strong, Q. C., for the application.*

*Mr. S. H. Blake, contra.*

MOWAT, V.C.—The plaintiff, a creditor of John Bucke, deceased, on the 15th June, 1866, obtained an order for the administration of the debtor's estate. The debtor had died intestate, and Daniel Bucke, his heir-at-law and administrator, was the person served with notice of the intended application for this order. Shortly afterwards, though the exact day is variously stated in the papers left with me, the sheriff of the County of Victoria sold the interest of Daniel Bucke, the heir, in certain real estate of the deceased, to Lewis Moffatt, under a writ of *venditioni exponas* against the heir; but the administration suit was proceeded with without making Mr. Moffatt a party, and without any notice being taken of his purchase. On the 15th September, 1866, the Master made his report under the order, finding, amongst other things, that there was no personal estate unadministered; that debts had been proved before him to the amount of \$746.17; and that the intestate had certain real estate, subject to incumbrances, the particulars of all which were given in the report. On the 23rd October, 1866, the Court made a decree on further directions, and thereby, amongst other things, ordered the Master to inquire "who was or were the legal real representative or representatives of the said John Bucke, living at the time of his death; and in case any

or either of them should have since died, who was or were the legal real representative or representatives of him or her so dying; and the said Master was to cause such real representative or representatives" to be made a party or parties in his office; and a sale of the real estate was ordered to be made if necessary. On the 29th January, 1867, the Master made his report, and thereby, amongst other things, found that Daniel Bucke was the sole heir and real representative.

Mr. Moffatt, as purchaser at the Sheriff's sale, brought an action of ejectment against the heir, to obtain possession of the property, and the plaintiff applied to the Chancellor to restrain this action, which his Lordship refused on the ground that the creditors had no interest in protecting the heir in the possession. It is not now disputed that whatever beneficial interest the heir had, after payment of the debts of the intestate, Mr. Moffatt became duly entitled to, and the question is, whether he became entitled to more than this.

The matter has come before me on a petition of the plaintiff, praying that the said Lewis Moffatt and Jonathan Baird, a purchaser under Moffatt, may be made parties to this suit, and may be bound by the proceedings therein; that the Master may be ordered and directed to proceed to a sale of the said lands, pursuant to the decree on further directions, notwithstanding the sales to Moffatt and Baird, and that for these purposes all proper directions may be given.

A preliminary objection was taken that the proceeding by petition was irregular; that the plaintiff should have taken out an order to revive on *præcipe* under the general orders, or should have made the purchasers parties in the Master's office under the decree on further directions. It was not disputed on the part of the plaintiff, that an order to revive would have been proper under the general orders, nor was it contended that the purchasers are bound by the proceedings which have been taken in the matter since their rights accrued. It is well settled that where a party becomes an insolvent or a bankrupt *pendente lite*, his assignees must be brought before the Court, though in general persons becoming entitled *pendente lite* under assignments from

the parties themselves are bound by the suit without being made parties to it ; and the reason given for such rule as to assignments, is, because the interest of assignees in bankruptcy arises from operation of law, and not by act of the parties. I am not aware of any decision as to whether a vendee under an execution stands in the same position as the assignee of a bankrupt or an insolvent, for the purposes of the rule (a).

But this being conceded, it follows that the plaintiff should have taken out an order to revive before the report of the 15th September, 1866, was obtained, and should in fact have taken no proceedings affecting Mr. Moffatt's interest after he became purchaser at the sale. But where a plaintiff neglects to revive in time, I do not understand that the suit is barred for ever, or that the interest of the parties who should have been introduced into the suit is beyond the plaintiff's reach through the omission. They are not bound by the proceedings which were had in their absence : and the common order to revive is not adapted to a case where special relief is needed: *Goodale v. Skerratt*, 1 Sm. & G. app., 7 ; *Phippen v. Brown* 1 Jur. N. S. 698 ; the old practice of filing a bill to add such parties is also abolished : General Order, June, 1862 ; Consolidated Orders 205, 244, 438, 444, *Shipbrooke v. Hinckinbrooke*, 13 Ves. 393 ; 1 *Smith's Pr.* 7 Ed. 240 ; 2 *Dan. Pr.* 4 Ed. 1436: and the proceeding by petition, if not the only one now open to the plaintiff (see *Vibert v. Vibert*, Law R. 6 Eq. 251) seems more free from difficulty than any other. As to the suggestion that the new parties should not have been added under one of the directions contained in the decree on further directions ; this if correct, does not prevent their being added otherwise, after the reference directed by that decree was closed. I have therefore to consider the case on the merits.

The intestate died on the 2nd May 1865 and there was at this time in the hands of the Sheriff of the county, in which the lands of the deceased were situated, several writs of *f.*

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(a) See Story's Eq. Pl. sec. 158 a 7th Am. Ed.

*fa. and venditioni exponas* against the lands of his heir, who, as is sworn and not denied, was then and is still wholly insolvent, and unable to pay his debts, having in fact no property of his own of any kind whatever. On these writs the Sheriff sold the interest of the heir in the lands of the deceased, shortly after the granting of the administration order, the purchaser through his agent having notice from the plaintiff and two other creditors of the deceased, that they were such creditors, that they forbade the sale, and that they meant to take proceedings in this Court for the administration of the intestate's estate and the payment of their debts out of the same. The purchase money was considerably less than the value of the property, the property sold was the only valuable part of the intestate's property : and if it cannot be reached by his creditors they will lose their debts. This is the effect of the plaintiff's affidavits and the affidavits filed by the respondents do not impugn the accuracy of the affidavits of the plaintiffs in these particulars.

These being the facts, the question is, whether the purchaser is entitled to the property free from the debts of the deceased, or merely to the interest which will remain when the demands on the estate of the deceased are satisfied.

The sale was under the Statute 9 Geo. II. ch. 7, sec. 4, which provided that "lands \*\* shall be liable to, and chargeable with *all* just debts &c., and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty and shall be subject to the like remedies, proceedings and process \*\* as personal estates," &c. It was not suggested that there was any English authority shewing that the creditors of the heir could appropriate the ancestor's property to the prejudice of the ancestors' own creditors, by bond or other specialty. The analogy of the rights of creditors in the case of the heir and in the case of the executor has been pointed out and relied upon in England, and the Statute makes the analogy still closer in the Colonies, if this were a case of personal estate it would be clear. The creditors of a deceased person have a more

specific interest in the personal estate he leaves, than during his life time they had in his goods and chattels before execution ; they may restrain an improper disposition of these by the executor and may have them administered in this Court for the benefit of all persons concerned in the estate. This interest of his, however does not prevent an effectual sale for money being made by the executor before suit, nor require a *bona fide* purchaser to see to the application of the purchase money, a purchaser being authorized to assume that the sale is required for the due administration of the estate of the deceased debtor. On the other hand, if no such sale is made the creditor's debt is made by the Sheriff, out of the deceased debtor's goods : and if they have been made away with in fraud of such creditors, they may be followed in the hands of a participator in the fraud. On all these points the law is the same with regard to real estate which descends to the heir : *Gooch's case* 5 Co. 60, a, *App-harry v. Badingham*, Cro. Eliz, 350 : again the deceased debtor's goods cannot as a general rule be effectually alienated in equity by the executor in discharge of his own private debt, nor can they be sold by the Sheriff, under an execution against the executor for his own private debt, to the prejudice of the creditors of the deceased (see 2 *Williams* on Executors, 6 ed. 876 notes) ; and this rule applies where the executor is the residuary legatee, or otherwise entitled to the residue. No authority was cited to show that in this respect, also, the rule is not the same in the case of the heir. The reason is the same, thus the great injustice of a different decision in the case of an executor has been spoken of in strong language by the learned Judges (*McLeod v. Drummond*, 17 Ves. at 169 ; *Tarr v. Newman*, 4 T. R. at 627 ; *McMaster v. Phipps*, 5 Gr. 259), and the injustice is manifestly as great in the case of the heir ; it would strike the conscience quite as much that the ancestor's real estate should be withheld from his creditors, as that his personal estate should. The identity of the two cases is thus stated by the Master of the Rolls in *Kinderly v. Jarvis*, 22 Beav. 22 : "The purchaser (from the heir) assumes, as in the case

of the personal estate, that the sale is required for the due administration of the estate and effects of the deceased debtor, and is not bound to enquire further. The case would be varied in either case, if the purchaser had received direct knowledge that the sales were made for the purpose of defeating creditors, and had thereby become a participator in the fraud": see also *Reid v. Miller*, 24 U. C. Q. B. 610.

In the same case the Master of the Rolls expressly held, that under the English Statutes 3 & 4 Wm. IV. ch. 104, and 1 & 2 Vic. ch. 110, sec. 13, the rights of simple contract creditors of an ancestor as against the descended estates are not defeated by judgments entered up against the purchaser for his personal debts before suit by the creditors of the ancestor. In coming to that conclusion the learned Judge had difficulties to contend with in the language of the Statute of Victoria which do not apply to the Statute of George II.; but he observed of a different construction, in language which is not inapplicable to the respondent's contention in the present case: "This would be in effect to enact that one man's debt is to be paid out of another man's property, and that property which *prima facie* belongs to the creditors of a deceased person shall be applied in payment of the debts of his heir or his devisee. \* \* \* I apprehend that in such a case the Court must see very clearly and distinctly that the words of the Statute compel it to come to a conclusion which, at first sight, appears to be so contrary to common sense, common justice, and *common law*": *Bullen v. A. Beckett*, 1 Moore, P. C. N. S. 223.

On the whole, I have no doubt that Mr. Moffatt took merely the debtor's interest, subject to the payment of the debts of the deceased (see *Whitworth v. Gaugain*, 1 Ph. 728; *Wickham v. The N. B. and Can. R. Co.*, Law Rep. 1 Priv. Col. App. 64); a conclusion to which I have come independently of the circumstance that a decree for administration had been obtained and registered before his purchase.

Towards the close of the argument of the learned counsel for these defendants, he suggested that the application should have been in Court and not in Chambers, but an ob-

jection of that kind should have been made *in limine*. Solicitors have, both before the Secretary's appointment and since, found it convenient to make in Chambers here many applications which in England could not be so made, and the Judges have acquiesced in the practice, where no objection has been taken in time by the opposite party, the difference between an application in Chambers and an application in Court in a case like the present, being, under our practice, more nominal than real.

The order to be made on the petition will direct Mr. Moffat and Mr. Bond to be made and treated as parties to the suit, will declare that they are bound by the proceedings therein, up to the time of the Sheriff's sale, and that they were only entitled to the land in question subject to the payment of the debts of the deceased in a due course of administration. The new defendants are not bound by the proceedings had since their interest accrued, except so far as they consent to be bound by them (see *Houston v. Briscoe*, 7 W. R. 394; *Powell v. Heather*, 1 Law T. N. S. 479); but they should not unnecessarily require the repetition of accounts, inquiries, or proceedings.

The Master has power to report special circumstances without special instructions by the Court. If the respondents waive their right to object to the proceedings which have been taken since the purchase at the Sheriff's sale, the costs of all parties on the present application may be costs in the cause. Otherwise, I reserve further directions and costs.

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#### REES v. THE ATTORNEY GENERAL.

##### *Dismissing Bill.*

When a plaintiff swears to a good case, on the merits, the Court will, in its discretion, give him an opportunity to hear his case on the merits, even after an order to dismiss has been properly granted.

The Bill in this case was filed against the Attorney General, the Grand Trunk Railway Company of Canada, and

the Corporation of the City of Toronto, to set aside a patent alleged to have been obtained in fraud of the plaintiff. The case was at issue, and had been set down to be heard at the Spring sittings of the Court in March; but the hearing had been postponed at the instance of the defendants, the Corporation of the City of Toronto, on the grounds of not being at that time able to procure the attendance of the Post Master General of the Dominion, and the Deputy Minister of Justice, who were engaged in public duties—the Senate being in session at the time—and it had been arranged that the case should be heard before a Judge, who consented to hear it when the sitting of Parliament was over. No step was taken in the cause until after the Autumn sittings, beyond the Solicitor of the defendants, the Grand Trunk Company, writing to the plaintiff's Solicitor, just before the sittings, pressing him to go on, and the Solicitor of the Corporation of the City of Toronto writing him to the same effect, after the hearing term commenced.

Shortly after the close of the hearing term, the defendant, the Grand Trunk Company, moved for an order to dismiss the plaintiff's bill, which the Secretary granted.

*Mr. Hurd* now moved to set aside the order, urging that due diligence had been shewn on the plaintiff's part, up to the Spring sittings, that the delay then caused was on the part of one of the defendants, and the present defendants, the Grand Trunk Company, had acquiesced in the motion and the subsequent delay: that it was incumbent on the defendants to give him notice of their readiness to proceed, and to make arrangements for the hearing—the letters sent him were sent him too late to enable him to go down to hearing after their reception.

*Mr. S. H. Blake*, for the defendants, the Grand Trunk Railway Company, contended that he had nothing to do with the postponement of the case; he was a neutral party on the motion for postponement, and merely acquiesced, as he was bound to do, in the order of the Court. He was not bound to give any notice to the plaintiff, and wrote the plaintiff's Solicitor as a mere act of courtesy. There was ample time to

have had the cause heard before vacation, but another sittings had passed and no steps to hear it had been taken. The order to dismiss was regularly and properly granted, and this was a case, if ever there was one, in which it ought not to be disturbed.

In support of his application, *Mr. Hurd* filed his own and the plaintiff's affidavits, setting up, amongst other things, that the plaintiff had a good case on the merits, but not alleging that they had been misled as to arrangements to hear the cause.

**SPRAGGE, V. C.**, set aside the order to dismiss, on payment of costs, and gave the plaintiff leave to go to hearing, if cause heard within six weeks.

In the same case, the Solicitor for the Corporation of the City of Toronto, set the cause down to be heard under Order 162, and on the same day the above motion was heard, a motion was made by the plaintiff upon notice for "an order that the evidence on the hearing of the cause, pursuant to the notice of hearing given by the Solicitor of the defendants, the Corporation of the City of Toronto, be taken before a special examiner, or before the Judge on the said hearing, or that such hearing be postponed, and the said evidence be in the meantime taken as aforesaid."

*Mr. Hurd*, for the application.

*Mr. S. H. Blake*, for the defendants, the Grand Trunk Railway Company.

*Mr. C. W. Cooper*, for the defendants, the Corporation of the City of Toronto.

The arguments and positions on the motion were, in effect, the same as on the former motion. *Mr. Cooper* urging, that by obtaining a postponement of the hearing from the Spring sittings, under circumstances of exigency, he had not taken the conduct of the case out of the hands of the plaintiff's Solicitor, it was not for him to set it down, or have it heard, he was ready with his witnesses whenever the plaintiff proceeded

with his case, not having done so, he, on the part of the defendant, set the cause down in the present shape, with a view of having it dismissed on the merits, which he concluded was the practice under the order, which was passed to enable defendants to thus dispose of a case if the plaintiff neglected to proceed.

SPRAGGE, V. C., dismissed the plaintiff's application with costs, but refused to hear the cause on the day for which notice was given under the order, by the defendant, having given to the plaintiff time on the motion to set aside the order to dismiss—and one order was drawn, embodying the terms on which the relief was granted.

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#### GRAHAME v. ANDERSON.

*Appealing from Master's certificate of costs.*

An appeal from a Master's certificate of costs should be to the Court, not to a Judge in Chambers.

The following point of practice arose in Court :

*Mr. Edgar* appealed from the certificate of the Master on a taxation of costs, making his motion in Court.

*Mr. English* objected that this was properly a motion to be heard in Chambers, and contended that such was the English practice.

*Mr. Edgar* observed that he had followed the practice here, that such motions were here made in Court, in like manner as any other appeal from a Master.

THE CHANCELLOR said that the now settled practice here, in such cases, was to treat appeals from the Master's certificate of taxation as appeals from the Master's report, and therefore the notice and setting down must be held to be regular. He considered that to be the practice in cases of interlocutory certificates of taxation. The motion was then argued.

**SMITH v. HENDERSON.***Carriage of Decree*

No order is necessary under No. 211, Consolidated Orders, to authorize the defendant to take the carriage of a decree out of the plaintiff's hands.

*Mr. McGregor* moved to take the carriage of the decree out of the hands of the plaintiff, he not having proceeded within the time limited by the practice.

*Mr. Fletcher* objected that such a motion was altogether unnecessary, and that under order 211, Consolidated Orders, the defendant could, under the circumstances, assume the carriage of the decree without any order, and without applying to the Court.

THE SECRETARY considered no order necessary, and refused the motion with costs.

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**CRIPPEN v. OGILVY.**

An order to examine a witness *de bene esse* will be granted on an *ex parte* motion.  
An affidavit will not be allowed to be read if it contains alterations which are not initialed by the Commissioner before whom it is sworn.

Motion to examine a witness *de bene esse*—the motion was made *ex parte* on the authority of *Oliver v. Dickey*, 2 Cham. Rep. 87.

THE SECRETARY granted the order, but remarked “The plaintiff's affidavits cannot be read, being altered and not initialed by the Commissioner. If the plaintiff's Solicitor files an affidavit that Crawford is a necessary witness, then an order may go to the Master at Cobourg, taking the evidence of the witness *de bene esse*.

*S. M. Jarvis*, Solicitor for the plaintiff.

## RE CARROLL.

*Security for costs—Solicitor and client.*

Where, on petition against a solicitor for an account, it was alleged, and not denied, that he had large sums of the client's money in his hands, the petitioner, though resident in a foreign country, was relieved from giving security for costs.

The rule requiring security for costs is not so positive and inflexible but that the Court will relax it in their discretion, when the circumstances of the case require it.

A petition had been filed, on the part of Andrew Bleloch against his Solicitor, for an account. The petitioner was a resident of Scotland, and an order was made in Chambers that he should give security for costs: against this order he appealed.

*Mr. J. C. Hamilton* for the appeal.

*Mr. S. H. Blake*, contra.

The affidavits filed in support of the petition shewed that the Solicitor had received from the plaintiff \$6555, or upwards, which he had not paid over, or accounted for, and *Mr. Hamilton* argued that this not being denied by the solicitor, he had no right to security for the costs of the petition, which called upon him to account for the money.

The other side relied upon the rule which entitled a defendant to security where the plaintiff's residence was shewn to be out of the jurisdiction.

**MOWAT, V. C.**—In *Re Pasmore* (1 Beav. 94) seems an authority for the position taken on the part of the petitioner. That was a petition for taxation of a Solicitor's bill, and for the delivery of the deeds in his hands belonging to his client. The petitioner resided in Belgium, and as to the petitioner's right to security for costs, the Master of the Rolls said that, "as the party was not amenable to the jurisdiction of the Court, there was no doubt that he must give security for the costs of these proceedings, unless it appeared that the Solicitor had in his hands sufficient security for them." Now here it does appear that the Solicitor has in his hands

a sufficient security for his costs ; and unless he is able to file an affidavit denying this, I think the order for security must be discharged. Had he denied the allegations made on the part of the plaintiff, he would no doubt have been entitled to security without any adjudication on the question of fact so raised.

It is to be remembered that the practice of requiring security even in suits is not matter of positive law. The observations on the subject in *McCulloch v. Robinson* (2 N. R., 354) seem to be correct, and in accordance with other authorities (see *Kilkenny Railway Co. v. Fielden*, 6 Ex. 81, &c., 2 Archbold's Practice, pt. 5, ch. 12, p. 1828. 9th Ed.). Sir James Mansfield, C.J., there said : "I do not apprehend that it has ever been laid down that a party who goes abroad must, under all circumstances, give security for costs, or be subject to have his proceedings stayed. Here though there may be some hardship upon the defendant, there would be much greater on the other side, if the application were allowed." Rooke, J., said, "The general rule, no doubt, is, that where the plaintiff is out of the jurisdiction of the Court, he may be called on to give security for costs. But that rule is subject to be modified, according to the circumstances of each particular case." Chambre, J., said, "By the general rule of law, every man, not legally incapacitated may sue without giving security for costs ; but the Court has interposed, in certain cases, and required security ; this, however, is matter of discretion, and being so, the rule which has been adopted is not so positive and inflexible as not to yield to particular circumstances."

Accordingly, it is well settled that where a plaintiff has land within the jurisdiction of the Court, though in his own name, and under his own control, he is relieved from the obligation of giving security (*White v. White*, 1 Ch. Cham. 48). Where the land is in the name of the defendant himself, as trustee, the case is still stronger for a like determination, as the security which the land affords him is, in that case, greater than if his concurrence was not necessary to the plaintiff's disposal of the property. It was

contended that the rule applies, at law, to land only. If that were so, it would be proper to consider whether we should adopt the same rule; but the rule has not been restricted in Courts of common law to land; on the contrary, it has been held, at law, to apply wherever the plaintiff has "sure property" within the jurisdiction of the Court (*Edinburgh & Leith Railway Company v. Dawson*, 2 Dowl. N. S. 577). Of what nature property, other than land, must consist to be sufficiently "sure" or "permanent" (*Ibid*) has not been defined affirmatively, so far as I am aware of. In the *Kilkenny and Great Southern & Western Railway Company v. Fielden* (6 Exch. 81), where the means which the plaintiffs had in the country were held not sufficient to dispense with security, the reason given by Parke, B., was, that it was "of a fluctuating nature, and might not be available when judgment was obtained." Alderson, B., said, "it would be an unreasonable exercise of the discretion of the Court to substitute for a bond and direct covenant, something which is extremely indirect, doubtful and inconvenient." Now, a sum of money or a security in the hands of the defendant himself, is manifestly a far surer security to him, than land in the plaintiff's own name, and subject to his control, which he might dispose of at any moment; and the principle on which a plaintiff's possession of land has been held to be sufficient security, applies *a fortiori* to property which is in the defendant's own hands, and cannot be taken from him without either the decree of the Court, or his own consent.

In *Bristowe v. Needham* (2 Dowl. N. S. 658), a rule for security was discharged, on its appearing that the defendant had recovered judgment for a large sum against the plaintiff, and was willing that any costs which might be recovered against him, should be set off against this judgment.

In *Le Normand v. The Prince of Capua* (6 Jur. O. S. 64) the plaintiff's domicile was in France. She carried on business as a milliner and dressmaker in London, as well as Paris, and was frequently in London, but did not reside there, so as to exempt her on that ground from the obligation to give security. It appeared that the defendant admitted

that he owed her £640, and Lord Chief Justice Tindale, in delivering the judgment of the Court, said, "The defendant admits £640 to be due; and the proper termination of the case, is, that the sum which he acknowledges to be owing to the plaintiff, should be paid into Court on her behalf, and that a sufficient portion of it should be appropriated to abide as security for the costs." The other Judges concurring, an order was made accordingly.

In view of all these cases (see also *White v. White*, 1 Ch. Cham. 48), I think the proper order for me to make in the present case (an application under the summary jurisdiction of the Court against a Solicitor), is, that—the petitioner consenting that the Solicitor shall have a lien on the money and securities, in his hands belonging to the petitioner, for any costs that may be awarded to the Solicitor in this matter,—the order granted in Chambers be discharged.

I am glad that I have found this conclusion to be warranted by authority. It certainly shocks one's sense of justice and propriety, to suppose that a Solicitor who has in his hands a large amount of money, or securities, belonging to a client, can resist giving any account of either until the form is gone through of supplying him with a bond for securing the costs of the proceedings, where this form can add nothing to the Solicitor's own security, and may greatly embarrass the foreign client. Positive law creates such anomalies, but where the matter depends on judicial discretion, as this does, better results are looked for. In the present case there may be some good reason for demanding further security which does not appear, but I must adjudicate on the case according to what does appear.

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## GOURLAY V. INGRAM.

*Interpleader order—Where new trial refused under.*

Where on an interpleader issue the amount in dispute was \$60.40 only, a verdict having been given in favor of the claimant, and the Judge of the County Court who tried the issue having certified that he was satisfied with the verdict, the Court refused a new trial, although they thought that if the case had originally come before this Court for trial on the same evidence the opinion of the Court might have been against the claimant.

The verdict not having been endorsed on an office-copy of the order of interpleader, but on the record only, the supposed irregularity was held to be immaterial.

Where there was a variance between the issue directed by an interpleader order and the issue stated in the record, the latter being the issue which, if asked, the Court would have directed, *Held*, that, after trial, no advantage could be taken of the variance.

The plaintiff had a writ of *f. fa.* in the hands of the Sheriff of York, against the defendant for costs, \$60.40. Under this writ the Sheriff seized certain goods which Elizabeth Collard, wife of John Collard, claimed as hers. This Court, having at the instance of the Sheriff, granted an interpleader order for the trial of the question of property in the County Court, the trial took place, and resulted in a verdict against the plaintiff, the execution creditor. Two motions were now made: one on behalf of the claimant for her costs, and the other on behalf of the plaintiff, to be relieved against the verdict.

*Mr. McMichael*, for the claimant.

*Mr. Hodgins*, for the plaintiff.

**MOWAT, V. C.**—In support of the plaintiff's application, it was urged that the issue directed was, whether the goods were the property of the claimant, Mrs. Collard; while the issue by the record in the County Court was, whether, as against the plaintiff, these goods were the property of the claimant and her husband, or either of them. The latter was no doubt the issue which the Court, if asked, would have directed. The plaintiff made no objection to the form of the issue until after the claimant's

witnesses at the trial had been examined and cross-examined, and the claimant's case closed, when the objection was made to the Judge before whom the trial was proceeding. The Judge overruled the objection, and the execution creditor then produced his evidence, the result being a verdict adverse to him. I think the variance between the order and the record is no ground for now interfering with the verdict.

It was further objected on behalf of the plaintiff, that an office-copy of the interpleader order was not entered for trial as directed by the 69th section of the Chancery Act (Consolidated Statutes, U. C., chap. 12, page 60), but a record made up according to the practice in common law cases. The record may have been an unnecessary proceeding, but the order was drawn up in terms requiring it, and no objection was taken to this, nor to the record, until the time when the other objection was taken as already mentioned. It is clear that the irregularity, if such it was, forms no ground for interfering with the verdict.

It was further objected, that the verdict was not endorsed on an office-copy of the order, as required by the Chancery Act (page 60), but on the record only. This was the consequence of the record being entered for trial, instead of an office-copy of the order, and seems to me to be now immaterial.

But the principal ground urged by the plaintiff for setting aside the verdict was, that it was contrary to the evidence. I intimated during the argument that, if the case had originally come before me for trial on this evidence, my opinion would probably have been against the claimant; and I was asked to act on this view by deciding against her without a new trial. My brother Spragge has expressed a doubt whether the Court has jurisdiction to decide questions of this kind without a jury (*Gourlay v. Ingram*, 2 Chan. Cham. R. 238), and I feel the same doubt—the jurisdiction of the Court depending entirely on the statutory enactments. (U.C. Con. Stat. ch. 24, § 19; ch. 30 § 8; ch. 12 § 69. See *Rock v. Cook*, 2 Ph. 691; *Try v. Try*, 13 Beav. 422). It is to be

observed, too, that the Judge and jury, who saw and heard the witnesses, and perhaps had personal knowledge of their credibility, had advantages in these respects which I have not had. There does not appear to have been any misdirection; the Judge has informed me that he is satisfied with the verdict; and the amount in dispute is so small (\$60.40) that, under the circumstances, the parties should not be put to further expense in litigating the question. A new trial before a Judge of this Court with the assistance of a jury would cost more than a new trial in the County Court.

The claimant is entitled to her costs. There should be but one taxation.

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The matter was reheard in full Court, the same learned counsel appearing for the respective parties.

The following authorities were referred to in the course of the argument:—*Armstrong v. Armstrong*, 3 M. & K. 45; *Stace v. Martot*, 2 Ves. Sr., 553; 1 Spence's Equity Jur. 658, 659; *Wordall v. Smith*, 1 Camp. 333; *Maulson v. Joseph*, 8 U. C. C. P. 15; *Hale v. Saloon Omnibus Company*, 4 Drew, 492; Story on Agency, sec. 6, page 6.

The Court affirmed the judgment of the Vice Chancellor

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#### IN RE MALCOLM CAMERON.

##### *Taxation of Costs.*

A petitioner seeking to tax a bill of costs rendered over a year, must allege and establish items of overcharge, and shew special circumstances why taxation should be permitted.

This was an application by Mr. Fenton to have a bill of costs taxed. A petition had been filed, but failed to set out any special circumstances of overcharge, &c., and Mr. Fenton sought to supplement his petition by affidavits, in reply to Mr. Spencer, who appeared for Mr. Cameron.

*Mr. Spencer* contended that there was nothing in his affidavit that could be replied to. The bills sought to be taxed covered a number of years; but it seems in 1863 a settlement was come to which would dispose of all matters previous to that date. A bill rendered in 1866 was referred to in a bill rendered in January, 1868, thus—"To amount of account rendered in 1866."

*Mr. Fenton* contended that this is a new rendition of the bill, and one to take it out of the statutory limitation for obtaining a taxation, viz: a year.

*Mr. Spencer*, contra, quoted to shew that general allegations of overcharge were not sufficient—*Re Bennett*, 8 Beav. 467-8; *Cowdell v. Neale*, 1 C. B., N. S. 332; *Re Brown*, 1 DeG., M. & G., 332 and 333; *Re Read v. Cotton*, 6 U. C. L. J. 114; *Re Ruttan*, 8 U. C. L. J. 47; *Re Colquhoun*, 9 Beav. 146. To shew that overcharge must be so gross as to amount to fraud—*Re Fyson*, 9 Beav. 117, 118, 120. That special circumstances must have come to knowledge of party—*Re Whicher*, 13 M. & W. 549. Onus of shewing overcharge lies on petitioners—*Re Towle*, 30 Beav. 170. A petition will be dismissed with costs if only trifling overcharge is shewn—*Re Drake*, 8 Beav. 123; *Re Thompson*, 8 Beav. 237. Petition dismissed when bill had been rendered fourteen months—*Re Harper*, 10 Beav. 284, 290.

THE SECRETARY dismissed the petition with costs, with leave to petitioner to file a new petition if so advised.

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## GRAINGER V. LATHAM.

*Witness, privilege of—Administration suit.*

On an application made by the plaintiffs in an administration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution which had been recovered by a third party against a debtor to the estate, on the grounds of the same being fraudulent and collusive, the debtor was subpoenaed as a witness in support of the motion, and on his examination touching the *bona fides* of a judgment in question, he thus stated his objection: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit, in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me." Held, that this objection was not tenable, and the witness was ordered to attend again, at his own expense, and answer, and pay all costs occasioned to the plaintiffs and the personal representative by his refusal. Held, also, that to entitle the witness to privilege, on the ground that his answer would expose him to a "penalty or forfeiture," he must state explicitly that he believes his answer would have that effect, and not merely leave it to be inferred that his answer would have that effect.

This was an administration suit. The personal representative obtained a decree against a mortgagor, a debtor to the estate, and the mortgaged property was sold and failed to realise the amount of the mortgage. Execution was thereupon issued for the deficiency. The execution was returned *nulla bona*, in consequence of a prior judgment having been obtained by a third party under execution, upon which the debtor's goods had been sold. The plaintiff then served notice of motion on the personal representative for an order directing him to impeach the judgment and execution so recovered, on the grounds of fraud and collusion. In support of such motion the mortgagor was subpoenaed as a witness. On his examination he was asked certain questions touching the *bona fides* of the judgment, which he declined to answer, and his objection was thus stated in the depositions: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit, in which I am a party, and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me."

*Mr. Holmsted*, for the plaintiff, moved for an order to compel the witness to attend again, at his own expense, and answer the questions refused to be answered, and especially those enumerated in the notice of motion, and all others arising out of his answers to such questions, and that he should be ordered to pay the plaintiff and the personal representative all costs occasioned by his refusal to answer. In support of the motion he filed an affidavit of the plaintiff's solicitor, alleging that notice of motion had been served on the personal representative, for an order directing him to institute proceedings to impeach the judgment referred to, which motion was still pending; that in support of such motion the judgment debtor had been called as a witness, and had attended and been sworn, but had declined to answer questions put to him, as appeared by the depositions: that he was advised and believed that the plaintiff could not safely proceed with such motion until the questions referred to had been answered. He read, also, the depositions taken before the Examiner, and referred to *Daniel Chan*. Pruc. 521-861, 863-4; *Scott v. Miller* (No. 2), Johns 328; 5 Jur. N. S. 858; *Taylor* on Evidence, 1311-1317; *Reg. v. Bray*, 30 L. J. Q. B. 70.

*Mr. J. D. Edgar* opposed the motion. He read the affidavit of the witness in the following terms: "That several of the questions mentioned in the notice of motion herein against me were never put to me, and others have already been answered, and others of them I have never objected to answer. \* \* \* \* \* The only question I have ever refused to answer, and which I intend to insist to the last upon my right to refuse to answer by compulsion, is that relating to the consideration for the note referred to in said notice, on the ground that if the fact is as stated in the notice, upon which I have been already examined, then I would be liable to be proceeded against, both in this court and at law. That had the information now sought been asked in a less impertinent manner than it was I would have had no objection to give it, whether the facts would afford a good defence to those entitled or not, it would be for the advisers of the plaintiff to consider; but to any adverse proceeding in a

suit, to which I am not a party, I shall offer every opposition in my power."

This affidavit was objected to, on the ground that the witness could not be heard to contradict the depositions, by which it appeared that all the questions enumerated in the notice of motion had been put to the witness, and that he had refused to answer them. The learned Judge allowed the affidavit to be read, subject to the objection.

*Mr. Edgar* argued that the witness, being a party to the judgment sought to be impeached, would be also a necessary party to the suit to impeach it, and that therefore he was not bound to answer any questions put for the purpose of fishing out evidence as to the *bona fides* of the judgment in question; that the examination of the witness, in the way adopted in this case, was, in effect, an attempt to obtain discovery by indirect means without suit, which could not be permitted.

**SPRAGGE, V. C.**—This is an administration suit. A decree has been made, and a notice has lately been given by the plaintiff of an application to the Court for an order directing the personal representative of the estate to take proceedings for the purpose of contesting the validity of a judgment recovered by a third person against a debtor of the estate, upon which judgment execution has been issued, and the goods and chattels of the debtor have been sold.

In order to inform the Court as to the propriety of taking the proposed proceedings witnesses have been examined, and among them the debtor himself. The judgment was upon a note made by him, and questions were put to him as to the consideration of the note; these questions he refused to answer. I take from the note of the Examiner the ground of the objection as taken, as fully, I think, as to any of the questions put: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an appli-

cation in which fraud and collusion are charged against me. I can't say exactly when the note was made on which this action was brought; I refuse to answer any questions relative to that suit, on the grounds I have stated above; I refuse to state what the consideration was, on the grounds above stated." The question to which exception was thus taken was put by the plaintiff. In answer to a question from another party, Mr. Rae, the witness, said that the judgment "was recovered for a bona fide debt, but not upon a debt due to him (the judgment creditor) personally." This answer, of course, cannot excuse the witness from answering all questions tending to shew want of consideration, if he is bound to answer at all.

The grounds upon which, as stated in the notice of motion, it is proposed to impeach the judgment, are that the same was recovered fraudulently and collusively, and is colourable, and was entered, and the execution issued thereupon with intent and design to defeat, hinder and delay creditors, and the administrator of the estate which is being administered in this Court. In support of these grounds, want of consideration is clearly a material element. The objection of the witness is, in substance, this: that it being proposed to file a bill against his judgment creditor and himself to impeach the judgment, upon certain grounds stated he cannot be called as a witness *in this suit*, to give evidence shewing that it is impeachable. If, upon such a bill being filed as it is proposed to file, the witness would not be bound to answer such questions as have been put to him, I shoid say that he is not bound to answer them now; but if the fact that it is fraud and collusion that are sought to be established against him would not protect him from answering in that suit—and I think it would not protect him—then his objection is reduced to this, that he cannot be called upon *in this suit* to give evidence.

As a witness, simply, he would clearly be bound to give evidence, for the point to which he is examined is material, to enable the Court to come to a right conclusion upon the application pending in this suit. Then, does the circumstance

of his being a proper party defendant in such a suit as is proposed to be brought, excuse him from giving evidence ? If his defence in that suit would be prejudiced by his evidence in this suit, it might be a good ground for not holding him bound to give such evidence ; but I assume his answers would be the same in both suits ; and it would be as much open to him in this suit as in that to object to the propriety of questions put to him, and to protect himself when his answers would expose him to penalty or forfeiture. Any question tending to shew fraud or collusion in the obtaining of the judgment he would clearly be bound to answer upon being examined in that suit, and answers to such questions not being protected there, and they being material upon the application in this suit, I do not see upon what grounds I can hold him excused from answering them. I feel that I ought not to do so except upon good and sufficient grounds, for my doing so might have the effect of excluding evidence necessary to enable the Court to come to a sound conclusion upon the propriety of granting or withdrawing its sanction to the proceedings contemplated by the notice of motion.

It is suggested that answers to the questions put might subject the witness to penalty or forfeiture. They may, or they may not. I cannot assume that they would—the inference would rather be the other way, for the witness, while stating grounds of objection to answer, does not state the objection suggested ; and in answer to Mr. Rae he stated that the judgment was recovered for a *bona fide* debt. I only decide that the grounds of objection taken are not tenable. If answers would expose the witness to penalty or forfeiture, there is nothing to prevent his taking that ground when he is examined. It is clear that he can protect himself only by taking that ground explicitly.

I do not think that the course which has been taken in this case is open to any serious abuse. It is only in cases where it becomes the duty of the Court to approve or disapprove of proceedings being taken—and such cases are rare—that such a course can be taken ; and when such duty is thrown upon the Court it must have the best evidence that can properly be obtained to guide its judgment.

The order will be that the witness attend and answer the questions enumerated in the notice of motion of 21st May last, and all other proper questions (saving all just exceptions); and the costs must, of course, be paid by him.

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### GRiffin v. McGILL.

*Infant, investment and application of fund for maintenance and education of.*

Where a legacy bequeathed to an infant had been paid into Court, the interest thereon was ordered to be paid out as it accrued, for the education and maintenance of the infant on its being shewn that the money was required for these purposes.

In this suit a legacy, bequeathed to one Sarah Shuter Hall, had been paid into Court, and the executors of the testator's will discharged from all liability in respect thereof.

*Mr. S. H. Blake*, on behalf of the legatee, applied *ex parte* on petition for the investment of the said money, and for payment out of the interest, or dividends thereon to Sidney Smith, the uncle of the petitioner. The petition was supported by the affidavit of the said Sidney Smith, and it appeared that the said Sarah S. Hall was an infant; that she was in poor circumstances; that she was not able of her own means to continue and complete her education; that she had been lately removed from school, because she was unable to defray the necessary tuition, and other fees and charges; that unless the said moneys were invested, and the interest, or dividends thereon applied for her support and education, she could not continue, or complete her education. Mr. Smith, in his affidavit, undertook to apply the interest, or dividends aforesaid, in and toward the support, maintenance, and education of the petitioner, if such interests and dividends were paid out to him—*Re Coleman Trusts*, 1 Irish Eq. 292—*Re McFarlane*, 2 J. & H. 673—*Re Law*, 30 L. T. Ch. 572, were referred to.

THE SECRETARY granted the application ; ordering the said Sidney Smith to account, when the petitioner attained her majority, for the application of the dividends upon the said funds, such dividends to be paid out half-yearly, the accrued interest, since payment of said money into Court, to be paid out forthwith to the said Sidney Smith.

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MERCHANTS UNION EXPRESS COMPANY v. MORTON AND THOMPSON.

*Practice—Reception of affidavits—Swearing affidavit in United States—Stating source of information.*

Where an affidavit, purported to be sworn in the United States before a Notary Public, and had the signature and notarial seal of such notary, held to be sufficient without proof *alibi* of such signature.

The order that an affidavit shall state the source of information of a defendant who swears as to his information and belief, is directory ; and it is competent to the Court to relax it in a proper case, and where the ends of justice would be served by so doing.

On the granting of an interim injunction, the plaintiff had leave reserved to file a certain affidavit. On a subsequent day, on a postponement of the argument, it was arranged that no further affidavits should be filed, the affidavit referred to was then in Court, but not filed, but was filed at a subsequent hour of the day. On an objection being made to its reception, it was held receivable.

The points of practice decided by the following judgment arose on the hearing of a motion for injunction in this cause :

*Mr. Crooks, Q.C., for the plaintiff.*

*Mr. J. Hillyard Cameron, Q.C., contra.*

SPRAGGE, V.C.—The first point is, whether the affidavit of Brown is receivable. When the hearing of this application was postponed from Monday to Tuesday—the full Court sitting in Rehearing Term—it was said by defendant's counsel, and assented to by the Chancellor, that no further affidavits should be filed. The plaintiffs had leave reserved upon the interim injunction being granted, to file the affidavit of Brown ; and it appears that when on Monday the application was postponed, the affidavit of Brown was in Court, in the hands of plaintiff's counsel, ready for use, if the application had

then been proceeded with; and under the leave reserved, plaintiffs would have been entitled so to use it. The affidavit was filed about one o'clock the same day, having been retained in the plaintiffs' hands, for the purpose, as is said, of having a copy made for the defendants, which copy was served on the afternoon of the same day. I have conferred with the Chancellor as to the reception of this affidavit, and he thinks, and I agree with him, that under the circumstances it ought to be received.

It is then objected that the affidavit is not receivable, it not appearing to be regularly sworn. It purports to have been sworn in the United States, before a Notary Public, and to have the signature and notarial seal of the Notary, as the officer administering the oath to the deponent. This I apprehend is sufficient under the 3rd and 4th sections of 26 Vic. ch. 41, and has been held sufficient by the Chancellor, and the Chief Justice of the Common Pleas, sitting in the Heir and Devisee Commission. If any doubt could arise from the use of the words "certified under his hand and official seal" following the words "Notary Public," in section 3, it is removed by the 4th section, which enacts, in substance, (to apply it to this case) that the signature and official seal of a Notary Public, purporting to be subscribed and impressed "in testimony" of an affidavit being sworn, shall be receivable without proof *aliunde*. It is hard to see what the Notary Public could certify except the facts, that he is a Notary Public, and that the affidavit was sworn before him: and he does, in effect, state, and declare, both these facts when he appends his signature and official seal "in testimony" of an affidavit being sworn before him.

The affidavit of George Henry Bangs is objected to, because he does not, in pursuance of one of the general orders of the Court, state the grounds and reasons of what he swears to. He is a detective employed by the plaintiffs in the matter of the Express robbery, upon which the defendants, with others, have been arrested; and he states, by way of excuse, as I understand, for not complying with the terms of the order, "that it is important that the source from which any infor-

mation is derived should not, at the present time, be disclosed as the said defendants would at once take advantage of any disclosures made, and the attempts to bring the said defendants to justice would thereby be materially affected, if not altogether defeated." The order, as a general rule, ought to be observed, and its observance enforced; but it is only directory; and it is proper, and it is competent to the Court, to relax it in proper cases, that is, where serious mischief would result from its being insisted upon. The deponent, in his affidavit, swears that a disclosure of his sources of information would tend to defeat the ends of justice. The Court ought, in such a case, I think, not to discard the affidavit, but to attach such value to the statements it contains, as in its judgment they may be worth.

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ATTORNEY GENERAL v. THE TORONTO STREET RAILWAY COMPANY.

*Amending information.*

Where an information had been amended by merely adding a party, by the direction of the Court, a motion to take the amended information off the files, because not signed by the Attorney General, was refused.

The information was originally against the Toronto Street Railway Company only, and the cause had been heard as against them, when the Court pronounced judgment, directing that the Corporation of the City of Toronto should be added as defendants. This had been done, but the amended information had not been signed by the Attorney General.

*Mr. Roaf*, Q.C., now moved that it be taken off the files for irregularity, in not being so signed.

*Mr. Strong*, Q.C., and *Mr. Morgan*, contra, argued that the amendment being merely the addition of a party, and such party added by the direction of the Court, it was unnecessary that the amended information should have the signature of the Attorney General; his sanction to the suit was sufficiently evidenced by his signing the original informa-

tion; the amendments had in no way changed the character of the suit.

*Mr. Roaf*, in reply—The draft amendments signed by the Attorney General ought to be produced—the original information purported to be signed by the Attorney General for Upper Canada. To be regular, the amended information should now be signed by the Attorney General for Ontario.

THE SECRETARY dismissed the application.

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#### McMARTIN v. DARTNELL.

*Practice—Affidavit—Erasures and interlineations in—Referring to, in notice of motion.*

All erasures and interlineations in affidavits must be initialed by the commissioner before whom it is sworn, otherwise it cannot be read. The notice of motion in referring to an affidavit should state the day on which it was filed.

*Mr. Smart*, on behalf of the defendants, Dartnell and Morland, applied for an order for security for costs against the plaintiff. The application was supported by an affidavit of Edward Taylor Dartnell.

*Mr. S. H. Blake* objected to the reading of the affidavit on the ground that there were numerous erasures and interlineations in it which had not been initialed by the commissioner before whom it was sworn, and also that the day upon which the affidavit was filed was not mentioned in the notice of motion.

THE SECRETARY ordered the original affidavit to be brought before him from the office of records and writs—after examination. The objections are good: since the year 1860, erasures or interlineations in affidavits had to be initialed. The notice of motion ought to have mentioned the day on which the affidavit was filed, as it had been filed several days before the said notice of motion was served. The objections are fatal and the application must be refused with costs.

## RE CARROLL.

*Solicitor and client—Summary jurisdiction.*

A Solicitor is liable to account for moneys or securities in his hands under the summary jurisdiction of the Court, although such moneys or securities may have come to his hands as an agent for the owner, and not strictly in his character of Solicitor, or attorney, or involved any duty as such in the holding or possession of them.

The petition in this matter was filed by Andrew Bleloch of Glasgow, and alleged that the Solicitor, was on the 15th of April, 1866, and hath since been a practising Solicitor. That at the period mentioned Messrs. Duncan & Clark as the Canadian agents of the petitioner, had entrusted Mr. Carroll with the sum of \$7855 as represented by eight several mortgages, for which a receipt, or acknowledgement, had been given in the following terms :—"Memorandum of mortgages given here, viz, McClear 560, Sear 670, Woods 950, Helbs 1128, do. 804, Cameron 1838, De Grassi 800, Montgomery 600—\$7855. I have received above mortgages at sundry dates from Messrs. Duncan & Clark, and hold the same on behalf of Mr. Andrew Bleloch, whose property they are.

CHARLES J. CARROLL.

Witness,

LAWRENCE BURNS.

Toronto, April 15th 1866.

*Mr. J. C. Hamilton*, for the petitioner, cited on the question of summary jurisdiction, Merrifield on Attorneys, p. 87—*Re Aitken* 4 Barn., and Ald. 47—*Re Kempt*, 1 Bing. 91—*Re Cullen* 27 Beav. 51, *Dickson v. Wilkinson* 4 Deg. & J. 508—*Re Wright* 12 C. B. N. S. 705—*Re Hill*, Weekly notes 1868, p. 160—*Re Fenton*, 3 A. & E. 404.

*Mr. S. H. Blake*, contra, contended that the money was received as agent merely, that Mr. Carroll had a set-off against the amount received, and that an account between the parties would have to be taken before a settlement could be arrived at, and that it was therefore necessary a bill should be filed. It was not a case for summary jurisdiction. He brought, or offered to bring into Court, a mortgage in which a large portion of the funds were invested.

THE SECRETARY made the following order :—Upon the petition of Andrew Bleloch, and upon hearing the Solicitors for the petitioner and for the said Charles Ingersoll Carroll, and upon reading the affidavits of Samuel Clarke, Duncan Clarke, James Cleland Hamilton, and Charles Ingersoll Carroll, and the exhibits therein referred to ; it is ordered that the said Charles Ingersoll Carroll do forthwith deliver over to the petitioner's Solicitors the indenture of mortgage from Winniette De Grassi to the above named Clarke, and dated the fourteenth day of October, one thousand eight hundred and sixty-four, and all the deeds and evidences of title relating to the lands and premises comprised therein, which may be in the possession, custody, or control of the said Charles Ingersoll Carroll.

And it is further ordered that the said Charles Ingersoll Carroll do forthwith, after the service hereof, pay into Court, to the credit of the matter, the sum of six thousand five hundred and fifty-five dollars, that being the balance due to the said Andrew Bleloch, of moneys belonging to him in the hands of the said Charles Ingersoll Carroll. And it is further ordered that the said Charles Ingersoll Carroll do pay to the petitioners his costs of this matter forthwith, after taxation thereof by the master of this Court.

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#### RE WALKER.

*Taxation of costs—Attorney and client—Summary jurisdiction.*

A Solicitor is liable for moneys which have come to his hands and can be called on to account under a summary order although the transaction may be one, which were the party not a Solicitor, would be an ordinary case of principal and agent.

*Mr. Edgar* moved to tax costs and for payment by a Solicitor of certain moneys in his hands as was alleged.

*Mr. McGregor* contra.

It appeared that the Solicitor had invested the money in certain oil lands which he had expected to prove profitable : that he wrote to the clients that he had done so, and they

did not repudiate the investment, but it was alleged stood by to see how it would turn out.

*Mr. Edgar* contended that the client was at liberty to acquiesce in, or to repudiate the investment; they elected to take the money by now coming into court and asking for it, the investment was made without authority, and no particulars were furnished clients for some time afterward.

*Mr. McGregor.* The clients have acquiesced,—they stood back to see how the investment would turn out: the case is merely one of principal and agent, not of attorney and client. In the early part of 1867, the agent had written that he had invested the money, when they stood by and were ready to take the benefit of the investment if it had turned out well. It is not a case for summary jurisdiction. To entitle them to that, they should have promptly repudiated, but there is no evidence of repudiation, and no grounds shewn for summary jurisdiction. That jurisdiction is not intended to apply to cases of disputed liability.

*Mr. Edgar*, in reply. It is only necessary to shew the relationship that of attorney and client; the non-repudiation is not of importance. The party being a Solicitor, gives the summary jurisdiction which, were he not a Solicitor, would have to be sought by bill.

THE SECRETARY after considering the matter, made an order as applied for.

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EASTMAN v. EASTMAN.

*Practice—Re-taxation of costs.*

A re-taxation of a Solicitor's bill will not be ordered unless improper charges are specified and established.

*Mr. E. Henderson*, moved for an order to re-tax the bill of costs of plaintiff, or rather that the taxation should be opened and that he should be allowed to attend before the Master. It was not attempted to impeach the regularity of the proceedings upon the taxation, but a re-taxation was

sought on the ground that through inadvertance no person attended upon the taxation in the interests of his client. The taxation appeared regular and no particular items of the bill as taxed were specified as objected to, but he thought that on a re-taxation he could succeed in having the bill further taxed down.

The application was supported by affidavits shewing the facts.

*Mr. Donovan*, contra, contended that the motion was irregular, and that an application of this nature must be by way of petition, and not on notice of motion—and even if technically proper could not succeed, as no merits were shewn. No particular items of the bill was pointed out as exorbitant or erroneous, no improper conduct is alleged: *Re Catlin*, 18 Beav. 598, was cited.

THE SECRETARY.—I must refuse this motion. No improper items being pointed out in the bill as taxed, I can grant no relief.

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#### READ v. SMITH.

*Practice—Allowance of error and appeal bond.*

It is not necessary to move for the allowance of an error and appeal bond, if not moved against within fourteen days from notice of filing given, it stands allowed.

In this suit the defendant Smith had filed his petition of appeal to the Court of Error and Appeal, and had filed the usual bond, and now moved for its allowance.

*Mr. Fletcher*, contra, contended that under Order 28, of the Error and Appeal Orders, this motion was unnecessary. The practice was to serve a notice of filing the bond upon the Solicitor of the opposite party, and if the bond was not moved against by the respondent within fourteen days from the service of such notice, it stood allowed without motion.

THE SECRETARY dismissed the motion with costs.

## GLASS v. MOORE.

*Practice in mortgage cases after service by publication or substitutional service—Decree.*

In mortgage suits where the bill has not been personally served, it is not the proper practice to move for allowance of service. An order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*. The decree in such cases is now made in Court, not upon *præcipe*.

In this case an order for service of the bills by advertising had been made, the advertisement having been duly published and no answer having been filed, although the time for answering had expired, an application was made to allow the service, the usual material being produced.

**THE SECRETARY.**—The practice since the decision of Mowat, V. C., in *McMichael v. Thomas* (14 Eard. 249) has been changed. In mortgage suits such as this, where the bill has not been served personally, it is not proper to move for the allowance of service according to the former practice. When a defendant in such case is in default for want of an answer, an order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*; instead of taking out a *præcipe* decree immediately upon the allowance of service, the decree is now made in Court.

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## BOLSTER v. COCHRANE.

Where defendants made a proposal for settlement before answer, and there was no promise or proposal to extend the time for answering during the pendency of the negotiation:

*Held.* That there was no irregularity in the plaintiff's noting the bill *pro confesso* at the expiration of the time for answering.

An order to amend which is obtained before serving the bill, does not require service.

Where a bill had been amended, and the affidavit was of service of "the bill," the Court presumed the bill served was the bill as it stood at the time of service.

Where a defendant obtains an order for security for costs, it is not necessary to file affidavits shewing that the order has been complied with before the bill is noted *pro confesso*.

Where defendants took separate orders for security for costs, and the plaintiff obtained an *ex parte* order giving him liberty to pay \$400 into Court, instead of filing security by bond, the money so paid in was held to be security for all defendants, though the order recited one only of the orders for security.

*Mr. S. H. Blake*, for defendant Cochrane, and *Mr. Spencer*, for defendant Clark, moved to set aside order *pro confesso* on several grounds:—

That the note *pro confesso* was entered too soon; that when said note was entered the plaintiff had not shewn, and did not shew or prove how or when he had complied with said order; that the defendants had never been notified of compliance with said order for security for costs; that the order to amend taken out by the said plaintiff had not been served and no proof of the issuing of the same was before the Court at the time of the entering of the note *pro confesso*; that the affidavit of service filed, upon which said note was entered, did not shew that the amended bill was served; that the *præcipe* requiring the Clerk of Records and Writs to enter said note had not been properly filed, and it did not require said Clerk to note the said amended bill *pro confesso* against said defendants, and the said amended bill has not been noted *pro confesso* against the said defendants, and the said note was a note of default of an answer of said defendants to the original bill, which said original bill had never been served on the defendants, and no *præcipe* to note the said amended bill had been filed; that the endorsement on the office-copy of said amended bill, notified the defendants to file the answer with the Registrar of the Court, otherwise that the said bill might be taken *pro confesso*, whereas at the time the said answer was due (if ever due) it could not be filed with the Registrar, but should be filed with the Clerk of Records and Writs; because the said bill having been amended could not be noted *pro confesso* on *præcipe*.

*Mr. Defoe* opposed the motion.

It appeared that an order for security for costs had been granted at the instance of the defendant Cochrane, and on production of the order, the plaintiff was allowed to pay into Court £100, which it was contended was a compliance with the order for security.

THE SECRETARY overruled the objections as to regularity, but granted an order setting aside the note *pro confesso*, on

payment of costs. From this order the defendants appealed, and the case was heard before Mowat V. C. on the same grounds as taken before the Secretary, when, after hearing the same counsel for the respective parties. the following judgment was given:—

MOWAT, V. C.—An order was made in chambers, setting aside a note *pro confesso* against the defendant Cochrane, on payment of \$8.85 costs; and another order was made to set aside a like note against the defendant Clarke, on payment of \$3.50 costs. Both orders bear date 28th September, 1868. The defendants have appealed from these orders, contending that the noting *pro confesso* was irregular, and should have been set aside with costs. The contest is thus in substance as to costs only, but the plaintiff's counsel did not object on this ground to the appeals being heard.

The first objection urged in support of the appeals was, that negotiations were pending for a settlement, and that such negotiations disentitled the plaintiffs to have the bills noted *pro confesso* without notice to the defendants. It appears that on the 12th September, the Solicitor for the defendant Cochrane proposed a settlement, and offered a mortgage in payment, or part payment. The plaintiff's Solicitor required information respecting this mortgage, and the defendant's Solicitor undertook to obtain it. On the 21st, the information not having been furnished or any further communication made to the plaintiff's Solicitor on the subject, and the time for answering having expired, the Solicitor had the bills noted as complained of. It is not suggested that any promise or proposal for further time had been made; and I am aware of no rule which, as a matter of strict right, forbids the plaintiff in such a case from pressing on the suit, if he chooses to do so. I think that the plaintiff's entertaining the proposal of a settlement did not *ipso facto* relieve the defendants from the duty of putting in their answers, or of asking for further time to put them in.

The second objection was, that the bill was amended before service, and that the order to amend was not served. I

think an order to amend obtained before serving the bill does not require service. That is according to my own clear recollection of what was the rule when I was in practice; and I now find the rule expressly so laid down in Daniell's Practice, Vol. I. p. 883, 4th edition. (See also pp. 404, 496). "An order to amend, whether of course or special, should be served without delay on such of the defendants as have *appeared* to the bill, either in person or by their Solicitors; as the order only operates from the time of service." I find nothing to the contrary of this laid down anywhere; and it thus appears that by the English practice not only service of the bill, but appearance thereto, is usually required, in order to render service of the order to amend necessary. In this country we have dispensed with appearances, but that circumstance does not seem to afford any sufficient reason for requiring service of the order to amend where the original bill had never been served. I was referred to the 79th General Order as shewing that service of an order to amend before answer was contemplated by this Court; but that order does not purport, and was never designed, to require service where previously unnecessary; and, on the contrary, its express object was to dispense with service in cases in which but for the order service might be needed.

The third objection was, that the affidavit of service did not describe the bill served as an amended bill. No authority was cited to shew that that was necessary. An amended bill is "a bill," which is the expression used in the affidavit, as much as an unamended bill is. A bill may be amended several times before being served on some of the defendants, and, indeed, before they are made defendants; and the supposed ambiguity of the expression "a bill" would in such a case attach equally to the expression "amended bill." The correct principle seems to be, that it is always to be presumed the bill served was the bill as it stood at the time of the service. If the bill then contained amendments which were not in the office-copy served, and the defect be not subsequently remedied, the defendants can move to set aside the service and all proceedings thereupon.

I also incline to think that the taking out an order for security for costs should be treated as a waiver of any irregularity in the service of the bill, if there had been any; but there was none; for, confessedly, it was the amended bill, and not the original, that the defendants were served with.

The fourth objection was, that the defendants had a calendar month to answer, under the Consolidated Orders, and that the bill was noted at the expiration of four weeks. I find that my brother Spragge held, in *Irwin v. Lancashire Insurance Company*, 2 Ch. Cham. Rep. 291, that, by the true construction of the Consolidated Orders, the period for answering was four weeks only; and I agree with him.

The fifth objection was, that under the Consolidated Orders, an amended bill cannot be taken *pro confesso*. There is nothing in that objection.

The sixth objection was, that after the service of the bill the Consolidated Orders came into force, which directed answers to be filed with the Clerk of Records and Writs, instead of the Registrar as theretofore. I think defendants were bound to take notice of that change without any further service upon them. It was a matter of merely internal official arrangement, which could not mislead.

The seventh objection was, that the plaintiff should have filed with the Clerk of Records and Writs an affidavit to shew that the order for security for costs had been complied with. No direct or analogous authority for this contention was cited. In the books of practice, where the adverse proceedings are pointed out which follow, or which formerly followed, a defendant's default in answering, it does not appear to be anywhere suggested that an affidavit to the effect contended for is necessary. Our own Order (No. 104) intimates nothing of the kind; and no such affidavit, I am informed, is necessary at law to entitle a plaintiff there to sign interlocutory judgment. If there had been any agreement for time out of court, it certainly would not have been necessary to mention the fact, and shew the expiration of the extended time. I am, therefore, unable to say that such an affidavit as the defendants contend to have been neces-

sary, was essential to the regularity of the plaintiff's proceeding.

A further objection was taken on the part of the defendant Clarke, and the facts on which it depends are these:—The defendants took out separate orders for security for costs. By an *ex parte* order subsequently made (26th August, 1868), it was "ordered that the said plaintiff be at liberty to pay into court to the credit of this cause, subject to the further order of this court, £400, as security for costs in this cause, instead of filing security by bond." The plaintiff paid in £400 accordingly, and on the 2nd Sept. he served a copy of the order on the respective Solicitors for the defendants, with a notice thereon indorsed, that the plaintiff had paid in the £400 as thereby authorized. The order, however, recited the reading of the order for security taken out by Cochrane only, and counsel for Clarke contended that the money paid in was consequently a substitution for Cochrane's bond only. I think that is not so. A plaintiff is only bound to give security for one sum of £100, however numerous the defendants may be; though, where they appear by separate Solicitors, each Solicitor is entitled to the custody of a separate bond (Smith's Practice, 7th ed., p. 866.) Only one bond was required when the rule was to deposit the bond with a Six Clerk. The practice of requiring several bonds arose when it became customary to deposit the bond with the Clerk in Court of the defendant. (*Lowndes v. Robertson*, 4 Madd. 465.)

The *ex parte* order, substituting money for a bond, does not say that the money was to be for the security of the one defendant, and I do not perceive on what principle the circumstance of only one of the orders for security being recited, gives that limited effect to the order of substitution. I think the money paid in, is a security to both defendants equally.

After the best consideration that I have been able to give to the points raised against the regularity of the plaintiff's proceedings, I have thus failed to see sufficient ground for holding any irregularity to be established. At the same

time, I think that it would not have been taking an unreasonable view of his duty if the plaintiff's Solicitor had thought it right not to have the bill noted *pro confesso* the moment it was in his power to do so, without giving to the defendants previous intimation that he intended to do so; for there is no suggestion that the negotiations were not *bona fide* on the part of the defendants, and the plaintiff's Solicitor was aware they intended to file answers if no settlement was come to, but he no doubt thought they had no good defence to offer. In view of all the facts, and of the difficulty of some of the points of practice which I have had to look into, while I am of opinion that the appeals must be dismissed, I think they should be dismissed without any costs of the appeals.

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#### DENISON v. DENISON.

##### *Time for appealing.*

Leave to appeal after the time limited by the Orders will not be granted, except under special circumstances, and on a strong case accounting for the delay.

A motion was made on the 13th November, 1868, for leave to appeal at the December sittings of the Court of Appeal. Judgment had been given in the case in September, 1867, and from this judgment the leave to appeal was now sought.

Security for costs had been given in February, 1868, with liberty to the plaintiff to go down to the sittings in July, 1868. This security was objected to and fresh security given on 18th April, 1868. The plaintiff neglected to communicate with his Solicitor in time to go down then. Spragge, V. C. had refused a similar application. The motion was now, with his leave, renewed: an additional affidavit being filed shewing the plaintiff's poverty.

*Mr. Sullivan*, for the plaintiff.

*Mr. S. H. Blake*, for assignee of Denison.

*Mr. Crombie*, for Bacon.

VANKOUGHNET C.—The only evidence or materials not before Spragge, V. C., is the poverty of plaintiff, alleged in his affidavit; but his examination thereon shews that he had means quite sufficient to put his Solicitor in funds to get up his case, a considerable portion of which he expended in travelling, &c. The case is not, therefore, in this respect, bettered; and I cannot, therefore, interfere with the decision already given. If I were to interfere, it would only be on the terms that the judgment held by Bacon, the innocent purchaser of it, should be paid or secured, or that it should be treated as valid, and Bacon's rights be unaffected.

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#### LAWRASON v. BUCKLEY.

*Amending bill after decree.*

No amendment of the bill will be allowed after decree.

*Mr. Roaf*, Q. C., for the plaintiff, applied on petition to amend bill after decree.

*Mr. Jones*, for the infant defendants.

*Barrett v. Gardner*, 1 Ch. Cham. R. 344; *Bank of Montreal v. Power*, 2 Ch. Cham. R. 47; Order 19, of 20th September, 1865, were referred to in the course of the argument.

VANKOUGHNET, C.—This petition was presented some time ago to amend the description of premises in the bill after decree and Master's report. I stated at the time that I did not see how it could be done; but was told that Mr. V. C. Spragge had made an order to amend in a similar case. I have seen him on the subject, and he does not recollect the case. In *Barrett v. Gardner* (1 Ch. Cham. Rep. 344) I ruled that it could not be done, and following that case, I must refuse the prayer of the petition.

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## STEWART V. HUNTER.

*Compensation to a purchaser for loss of crops, and against incumbrances.*

The growing crops on land are part of, and go with the freehold when it is sold. When therefore a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money; and the same order was made to extend to taxes due on the land, and unpaid.

The executors of the late James Stewart, Esquesing, sold certain of his lands in May, A.D. 1868, under a decree made in this cause. Mr. McGregor, for Mrs. Laidlaw, a purchaser of a portion of the lands sold, applied to have compensation for growing crops, which had been taken away by the tenant in possession at the time of sale. Mr. McGregor shewed that a representation was made at the time of sale, that the crops went with the land; and he contended that they did so as a matter of law, since the sale was without any reservation. Mrs. Laidlaw claimed \$150 and further sums for taxes and statute labour from the vendors.

*Mr. J. C. Hamilton*, for the vendors.

*Mr. J. Hoskin*, for the infant defendants.

*Mr. Wells*, for the executors.

*Mr. Downey*, for other parties interested.

By them it was contended that Mrs. Laidlaw had taken out a vesting order, and so waived any objection to the title, and that the motion was too late, as the land had been sold several months previously.

*Mr. McGregor* replied, contending that crops were not chattel property between vendor and vendee, and that he was willing to accept a reference as to the value of the crops, if the affidavits filed were insufficient.

The adverse parties did not press for a reference.

THE SECRETARY, after considering the case, made the order as applied for.

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## STEWART V. HUNTER.

*Devise—Dower—Will, construction of—Effect of widow's election.*

Where a testator devised one parcel of land to his wife in lieu of dower and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence shewing an intention that such last mentioned devises should be free from dower: it was held, that on the widow electing to take dower she forfeited not only the first mentioned parcel of land, but also the other.

In case of a sale of land, a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money; the value is to be computed with reference to the nature of the property.

*Mr. C. S. Patterson and Mr. J. C. Hamilton, for the plaintiffs.*

*Mr. J. Hoskin, for infant defendants.*

*Mr. Wells, for the executors.*

*Mr. Downey, for the other parties interested.*

MOWAT, V. C.—The property in this cause, which in February last (1868) I directed to be sold, has been disposed of; and the case being in other respects supposed to be ripe for final adjudication and settlement, the parties, by their Solicitors, appeared before me for that purpose, on the 19th September, 1868. On this occasion it was argued on behalf of the widow, that she was entitled to her dower, and also to all the benefits which the will gave her, except the N. W. half of lot No. 11 in the 5th concession, Esquesing, devised to her for life “in lieu of dower.” I was reminded by the learned counsel of the maxim *expressio unius est exclusio alterius*, and he argued, that the testator had expressly said of the devise of this parcel to the widow that it was in lieu of dower, and must be taken as having intended that she should have the other gifts in her favor, though she should elect to take her dower. But this contention seems to me to overlook the principle on which the cases proceed, which is, that the widow must elect between her dower and the provisions in her favor wherever it “appears from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower.” In other words, if

the Court can gather from the will that the testator intended the other devisees to enjoy what he gives them, free from any dower by the wife, she must give effect to this intention or forego all advantage from the will. Now that such was the intention of this testator is manifest from his giving the parcel specified expressly in lieu of dower. If she was to have the one parcel in lieu of dower, the devisees of the other parcels were to have these free from dower. I am not aware of any reported case on a will containing a gift to a widow expressly in lieu of dower, and another gift to her not so expressed. But the case of *Talbot v. The Earl of Radnor*, 3 M. & K. 252, is in principle not unlike. There the testator bequeathed to his sister a certain leasehold and an annuity; and it appears from the explanation of the case given by Sir W. Page Wood, in *Warren v. Rudall*, 1 J. & H., at p. 12, that the will did not connect the two bequests together, and that there were several intervening gifts. The leasehold was subject to a rent exceeding its value, and the legatee therefore wished to reject the leasehold and take the annuity only. The Master of the Rolls held that "as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not in that respect disappoint his intention and retain the benefit given by his will, but must take the benefit *cum onere*." She could not reject the lease with its burden, and yet take the annuity. The propriety of this decision, on the assumption "that the testator had shewn an intention to free his estate from the liability" for the rent, was recognised in *Warren v. Rudall*; though the learned Vice Chancellor was of opinion that such an intention was not fairly inferable from such bequests, and that in the case before him "it would be impossible to attribute to the testator any intention of the kind."

But that it was the testator's intention in the present case to devise his property free from dower, and that the widow's election to take dower disappoints his intention, is beyond a doubt. I have said that such an intention is manifest from

the very provision on which the argument for the widow is based ; but there are other provisions in the will by which, upon the authorities, the same intention must be held to be shewn. Thus, by the 11th paragraph of the will the testator ordered and empowered his executors to rent all his lands until his two daughters, Jennet Stewart junior and Mary Stewart, should come of age, or marry ; and in the codicil there is a similar provision, the executors being thereby directed to let and lease all the testator's "farm and freehold property" until a like period. Now numerous authorities have established that a power to lease puts a widow to her election ; and in *Parker v. Sowerby*, 4 DeG. McN. & G. 821, it was held, that the circumstance of the power being limited to the minority of the devisees makes no difference. From other parts of the will it appears that the testator contemplated a personal occupancy of the brick house on part of his farm by his devisees—a circumstance which has also been held to shew an intention that the same should be taken free from dower (see *Grant v. McKinnon*, Gr., and cases there cited.) The testator further directed a house to be built of specified dimensions, and at a certain specified cost, on one of the demised parcels ; and this seems as significant as a direction to cut down timber, which has been considered inconsistent with a wife's right to dower (see notes to *Streatfield v. Streatfield*, 1 W. & T., Leadg. cases, 329).

It was said of some of these provisions, that, if they shewed an intention to devise free from dower the parcels to which they refer, the exemption was not to be extended—by inference—to the other property devised ; and *Birmingham v. Kirwan* (2 S. & L. 444) was cited to shew this. But the later cases lay down a different rule (see *Miall v. Brain*, 4 Madd. 119 ; *Roadley v. Dixon*, 3 Russ. 204 ; *O'Hara v. Chaine*, 1 J. & Lat. 665 ; *Parker v. Sowerby*, 1 Drew. 488).

Independently of these considerations, I do not think that the express reference which the testator makes to dower can properly be read in the restricted way contended for on behalf of the widow. The second clause of the will is

as follows : " Second, I give and bequeath to my wife, Janet Stewart, in lieu of dower, the north-west half of lot number eleven, in the fifth concession of the township of Esquesing, containing fifty acres, more or less, during her natural life, and after her decease to be equally divided between my two daughters, Mary Stewart and Janet Stewart, junior, or their heirs or assigns. I also bequeath to my wife thirty dollars per annum, to be paid to her out of the rents and profits of the west-half of lot number eleven in the fifth concession of Esquesing, containing one hundred acres, more or less ; and she is to live with my daughter Mary Stewart in the brick house, and to have her board and clothes during her natural life. I also give to my wife Janet Stewart, one horse, one cow, two sheep, the single harness, and the buggy and cutter." I think, that though, grammatically, the parcel of fifty acres described appears alone to be given in lieu of dower, it would be no strained or unwarranted construction of the clause to hold, independently of all the considerations to which I have been adverting, that the testator's intention sufficiently appears to give, in lieu of dower, all the particulars named in the clause, and not the fifty acres only. If so, it would be impossible to suppose, from the gifts contained in the fifth clause, that the testator contemplated his widow's having a discretion to take her dower instead of the provision thus made for her by the second clause, and meant to place the additional provision made for her in the fifth clause on a different footing. The fifth clause is as follows : " Fifth, I will and bequeath to my wife, Janet Stewart, and my two daughters, Mary Stewart and Janet Stewart, junior, all my household furniture, to be equally divided between them by my executors. And I also give them all the wheat in the ground, and the Spring crop."

The point in question was not discussed at the Bar, when the case was before me last February. I have now had the advantage of Mr. Patterson's able argument on behalf of the widow, but on the whole I remain of the opinion expressed on the former occasion, viz., that by electing to take her dower the widow loses not only the fifty acres, but all the other gifts in her favor which the will contains.

The opinion I then expressed as to the compensation to which the widow was entitled for her dower in the uncleared land sold, is now acquiesced in by all parties. What I then said on this point was, in effect, that it might not be most for the interest of the estate, that the widow should receive a compensation for her dower out of the parcels to be sold, if the amount was to be ascertained by the usual method of calculating it; that it was not reasonable that the compensation for dower out of wild land, yielding no-rent, and almost incapable of being made available for income, should be calculated in the same way as dower out of improved property; that if no agreement on the subject could be come to, I would myself consider what a fair compensation would be, and that the amount might vary from the value by the annuity tables of one-third of the interest on the purchase money—the basis of computation which had often been adopted. Acquiescing in the view thus intimated, all parties have approved of an allowance equal to the value of an annuity of fifty dollars a year, in respect of all the lands sold, including the uncleared land, that sum being considerably less than the interest on one-third of the purchase money. I think this amount reasonable.

I continue of the opinion, also expressed on the former occasion, but now controverted, that the children, Mary and Jennet, being infants, and living with the widow, the household furniture, wheat, and other particulars, in the possession of the widow, and Mary and Jennet, jointly, or delivered by the executors to and used by the three, should be considered as in possession of, or delivered to, and used by, the widow alone; and that she should be charged accordingly. It was suggested on her behalf, that the wheat in the ground went to the devisee, and that the widow was not liable therefor to the executors; but the rule is, that where there is an express legatee of growing crops, they vest in the executors, and do not go to the devisee of the land (see 1 Will. on Ex., 6th Ed. 675.)

The new parties acquiesce in the accounts taken in their absence, but some of them desire a re-taxation of the costs.

Any of them may take out a warrant for this purpose, and after the result is ascertained, I shall give directions as to the costs incurred in the re-taxation.

All that remains to be done, besides this re-taxation, is, as I understand, the passing of the executors subsequent accounts—respecting which I have already given verbal directions; the ascertaining of the value of an annuity to the widow of fifty dollars—for which purpose further evidence of her age is to be furnished me; and an affidavit of a competent person as to the present value of an annuity of fifty dollars to a person of that age; and, lastly, the disposition of the costs of, and incidental to the petition of Mary Stewart and Jennet Stewart. I think the executors must have their costs as between Solicitor and client; and all other parties their costs as between party and party—with this exception that the widow should have no costs of the argument on this occasion, as this argument has not served to change any of the views I had previously expressed. I observe the decrees, as drawn up, direct the costs of all parties to be paid as between Solicitor and client—which does not seem to be the English practice, unless all parties consent to the taxation being in that way.

The Solicitor having the conduct of the cause will draft the order to be now made, giving effect to what I directed on the former occasion, and have directed now; and winding up the whole matter; and will make all the necessary calculations for this purpose, and submit to me the draft and calculations. When I have examined these, an opportunity will be given to such of the other parties as may be interested, to attend the settling of the order, if they desire to be present.

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## DICKSON V. COVERT.

*Examination of defendant.*

The examination of a defendant under the General Order 138, is the substitute for discovery by interrogatories, and to entitle a plaintiff to examine on any particular subject he must make a case for it in his bill. Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused with costs.

*Mr. S. H. Blake* moved, under the circumstances mentioned in the head note, for an order to compel the defendant to attend and answer.

*Mr. Hector, Q. C., contra.*

THE SECRETARY.—The bill in this case is filed for specific performance of an agreement entered into with the defendants for the construction by them of a railroad switch to the plaintiff's mills, the agreement being made conditional upon an Act of Parliament and a By-law of the Town of Peterborough being obtained, permitting the construction of such switch. The defendant, Covert, by his answer admits the agreement, and that the Act of Parliament and By-law were obtained, but he alleges that the by-law was afterwards repealed by the Town Council. The plaintiff has examined the defendant under General Order 138 for discovery, and on that examination he has refused to answer certain questions, and the present application is to compel answers to these. The plaintiff alleges that his object in examining the defendant is to discover facts on which to amend his bill charging that the repeal of the by-law was brought about by the act of the defendant. I do not think he can go on to examine the defendant on such a subject on the present record. The examination under the order referred to is the substitute for discovery by interrogatories under the old practice: *Proctor v. Grant* (9 Grant 26), and it was always necessary to lay a charge in the bill as the foundation for an interrogatory. I think, therefore, that a plaintiff cannot, examining a defendant for discovery under the above order, enter upon an examination which does not go to prove some allegation in the bill, or disprove some statement in the answer.

I must, therefore, refuse the application with costs.

## ROBINS v. CARSON.

*Evidence—Witness.*

A witness or a party is not obliged to attend and give evidence or submit to cross-examination, except he be duly notified or subpoenaed, even if he happens to be present when the proceedings are going on. Where therefore a party to a suit who had made an affidavit was present in the Master's office, and the Solicitor for the opposite party proposed to cross-examine him on his affidavit and he refused to answer, a motion *ex parte* to compel him to attend and be examined was refused.

*Mr. George Murray* moved, under the circumstances detailed in the head note, for an order to compel the defendant to attend at his own expense, and submit to cross-examination, on the ground that he should have submitted to be examined and answered when present in the Master's office and called upon to do so.

THE SECRETARY.—I do not think I should make the order asked for *ex parte*, even if such an order can be made at all.

Mr. Taylor, in his book on Evidence (5th ed.) 1066, after saying that if a witness be in Court as a spectator he cannot object to give evidence on the ground that the subpoena has only just been served upon him, goes on to say, "but in civil cases a witness may always refuse to be examined unless he be properly served with a writ." In 3 Bacon's Abr. 226, it is said "if a man who is not subpoenaed happens to be in Court during a trial he shall not be forced to be sworn against his consent."

A party may perhaps stand in a different position, but in the absence of express authority in favour of the application, I do not think I should make the order *ex parte*, besides the object being to cross-examine this person on his affidavit, it may be that the examination is of such a nature that he should have notice of the points on which he is to be examined: *Re Lord*, 2 L. R. Eq. 605.

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**MCQUEEN v. MCQUEEN.**

*Appeal from Master—where amount involved trifling.*

The court will not entertain an appeal from the Master where the matter in question is one involving only a very trifling amount, and no point of principle is involved—where, therefore, an appeal was brought where the matter in question was only some \$6 or \$10, the appeal was dismissed with costs.

This was an appeal from the Master at Chatham.

*Mr. T. Ferguson, for the appeal.*

*Mr. Roaf, Q. C., contra.*

**SPRAGGE, V.C.**, without calling on Mr. Roaf, remarked:—Upon the opening of the matter by Mr. Ferguson it appears by the certificate of the Master, read by him, that the matter in question is only \$6 or at most \$10—no question of principle is involved. Upon this they appeal from the Master (at Chatham). I think the matter is too trifling in amount to be the proper subject of appeal, and that the court ought not to entertain it at all. Mr. Ferguson explains that he is agent, and would not of his own judgment have brought the matter before the court. I dismiss it with costs.

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**WALMSLEY v. BULL.**

*Duty of Master—Master's Report.*

Under a decree for account, it is the duty of the Master to find whether a defendant is, or not, chargeable as for wilful default, if the question arises, without any directions in the decree to that effect. Where, therefore, a Master reported only that rents and profits had come to the hands of the defendant, and after stating a number of facts submitted to the Court whether he should or should not be charged, the matter was referred back to him to complete his report.

It is not competent to a Master to abstain from deciding any question properly coming before him for his decision.

This was an appeal from the Master in ordinary.

*Mr. S. M. Jarvis, for the appeal.*

*Mr. Spencer, contra.*

- The case was about to be argued on the merits, when, after hearing read the Master's report—

SPRAGGE, V. C., remarked.—I observe, upon hearing the report read, that the Master has reported only upon the fact of rents and profits having come to the hands of the defendant Bull; submitting to the Court whether, upon the facts stated, he should or should not be charged, in substance, submitting to the judgment of the Court the question whether the defendant is properly chargeable as for wilful neglect and default. By the General Order that question is made within the cognizance of the Master, without pleadings and without directions to that effect in the decree, and it is in effect incorporated in each decree, when a party is directed to account, and being within his cognizance, it is made his duty to report upon it just as much as if it were in terms referred to him. Reading the General Order as part of the decree, the Master is directed to report whether rents have been received, or whether it is through wilful neglect or default that they have not been received; and in the latter case, as well as in the former, it is his duty to charge the accounting party,—upon the one case he reports, upon the other he makes no finding one way or the other, but instead submits to the Court, for its decision, the question which the Court had referred to him for his decision. The report therefore comes before me in an imperfect shape, the reference only partially executed; and a question comes before me by way of appeal upon which the Master has exercised no judgment. I think my proper course is not to enter into the merits of the question, but to refer it back to the Master to complete his report; and I desire to add generally that, in my opinion, it is not competent to a Master to abstain from deciding any question properly coming before him for his decision, and instead of deciding it to submit it to the judgment of the Court. It is an inconvenient practice, tending to the increase of costs, and is an avoidance of duty committed to him by the court, not from any improper motives, but still an omission to execute part of the duty committed to him.

**CAMERON v. BARNHART.***Act respecting lands sold for arrears of taxes.*

The act 32 Vic ch. 35, respecting lands sold for arrears of taxes applies only to cases in which the validity of a tax sale is called in question. If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to the other branch of his case.

[December, 1868.]

Minutes spoken to with reference to the late Act, 32 Vic. ch. 35, Ont.

*Mr. Smart* for the plaintiff argued that the decree should be drawn up as pronounced; that the act being an *ex post facto* one it should receive the strictest construction, and that the reasonable operation of it would extend only to cases where the validity of a tax sale was directly called in question.

It was further contended that there was now no litigation to stay, the decree pronounced having decided the question between the parties, and that they could not go behind the decree and look at the bill to ascertain if any question as to a tax sale was raised by it; there was now no question of tax title before the Court. He referred, on the question of construction, to *Dwaris* on Statutes, 381.

*Mr. Kennedy*, for the defendant, argued that the Act applied to the present case, its object being to stay litigation of all kind in tax title questions. In answer to the position that the question had been disposed of by the decree, he suggested that he might choose to rehear the cause, when the question would have to be adjudicated on; the tax title was one of the main issues in the cause, and evidence as to it had been gone into.

**MOWAT, V. C.**—It appears that the decree in this case, my judgment in which is reported 14 Grant, 661, has not yet been drawn up by the plaintiff; and the question now is whether the late act "respecting lands sold for arrears of taxes," 32 Vic. ch. 35, prevents the decree from being drawn up and entered,

That act forbids any proceeding to be "taken in any suit or action now pending in any Court of Law or Equity \* \* in which any sale of lands for arrears of taxes, or the title derived, or claimed to be derived, from, or through such sale, shall or may be impeached, invalidated or brought into question, until after the end of the ensuing session of the Legislature of this Province." *Ex post facto* Statutes must be construed strictly; but it hardly needs the aid of that principle to perceive that the expression "brought into question" in this enactment, must be construed as meaning brought into question as to the validity of the sale (see *Broom's Maxims*, 4th Ed. 565). If a testator has devised a tax title, and there is a controversy as to the party to whom the testator meant to devise the property, a tax title is in one sense "brought into question," but not in the sense intended by the Legislature; and there are many other cases in which litigation may arise as to a tax sale and tax title, without the validity of the sale or title being questioned. To all such cases the Act has no application. It is equally obvious that, if a plaintiff at law or in equity claims land by two titles, one only of which involves any question as to the validity of a tax sale, the plaintiff must be at liberty to pass over this title, and to proceed, if he chooses, on his other title. That is substantially the present case. The plaintiff's bill proceeded on two grounds, one being the alleged illegality of the tax sale—as to which I expressed no opinion, and the other being an agreement between the parties—which I thought the plaintiff had sufficiently established to entitle him to relief (see the Report, p. 662).

It was suggested on the part of the defendants, that if, on a re-hearing or an appeal, the Court should differ from me on the point on which my judgment proceeded, the plaintiff would be entitled then to raise the question of the legality of the sale—which would be contrary to the act. The answer is, that the effect of that difference would be that the cause could proceed no further; but that, until the re-hearing or appeal takes place, and the Court determines that the plaintiff's only right to relief depends on the sale being illegal,

the plaintiff has a right to have it assumed that my judgment on the other part of the case is correct and will be upheld.

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### EX PARTE HILL.

#### *Quieting titles act.*

The certificate to be produced from the County Registrar as to the state of the registered title, must shew what memorials were registered up to the time of registering a certificate of the filing of the petition.

The liability of parties insured in Mutual Insurance Companies is a charge on the property insured; and an affidavit is necessary stating that there is no such policy in existence, or that the policies named are the only ones in existence.

It is necessary to shew that the notices posted at the court house and nearest post office were continued for the period directed by the referee. When, a year after the testator's death, a petition for a certificate was filed on the part of his devisees, notice was required to be given to the heirs or some of them.

[December 24, 1868.]

MOWAT, V. C.—This is an application under the Act for Quieting Titles, for a certificate of title to lot No. 7, in the second concession, southern division of the township of Etobicoke. The Referee has reported that the petitioners as trustees and executors under the will of Wm. Hepwell, deceased, are entitled to a certificate of title to the lot, with the exception of a certain portion thereof conveyed by the deceased to the Hamilton and Toronto Railroad Co., and subject to a certain contract entered into by the petitioners for the sale of the residue. One of the conditions of this contract is, that the title should be quieted under the Act.

I observe several defects in the proceedings, which will require to be corrected:—

1. There is no certificate or other evidence that the petition has been registered. This is indispensable under the Act (see sec. 4; sec. 5, sub-sec. 2). The County Registrar's certificate, which is among the papers, bears date January 7th, 1868, and the petition was not filed until the 3rd July. The Statute requires the petitioner to produce a certified

copy of the memorials of all instruments, not in the petitioner's possession or power, which were registered up to the time of the registering of a certificate of the filing of the petition. A certificate from the County Registrar must, therefore, be produced, shewing the registration of a certificate of the petition being filed, and shewing whether any and what memorials, not mentioned in the produced certificate of the 7th January, 1868, were registered up to the date of the registration of such certificate of the petition. The reason why Parliament required this is obvious. The petitioners may have ceased to have the title which they had on the 7th January, 1868. On the other hand, if there are transactions after the registration of filing the petition, the parties to them have, by force of the Registry Act, notice of the petition, and take subject to the proceedings that may be had thereon; and if their interests require that they should become parties to these proceedings, it is in their power to become parties (see sec. 19 of the Act).

2. There is an affidavit of two mutual insurance policies on the property being now in force. But it is not said these are the only ones. The affidavit should negative there being any others than those named. The Legislature has been pleased to enact as to mutual insurance companies (U. C. Con. Stat. ch. 52, sec. 67), that all the land, mentioned and declared liable in the policy of assurance, shall stand pledged to the company for the liability of the assured in respect of his proportion of the losses or expenses accruing to the company during the continuance of his policy. Many such companies exist in the Province, and the policies are seldom, if ever, registered; and it has therefore been thought reasonable to require applicants under the Act for Quieting Titles to shew by affidavit whether there are any such liens, so that, if any such exist, they may be excepted from the operation of the certificate. To make this rule effectual, the affidavit should shew all the policies; should state that there is no such policy in existence, or that the policies named are the only ones in existence.

3. The 504th Consolidated Order requires the advertise-

ments at the court house and post office to be continued for such period as the referee has named. The affidavits shew the due posting of the advertisements in the first instance, but do not shew that they were continued for any period. For all that appears, they may have been torn down in an hour afterwards, and never again put up. This defect must be supplied.

4. But the most important difficulty remains. The petitioners claim under the will of Mr. Hepwell, who died on the 5th Nov., 1867, without issue, leaving numerous heirs in Europe and one in Ontario; and none of the heirs has been served with notice of the proceedings. Under the will a considerable part of the testator's estate goes to his heirs, and a considerable part to others. The object of the petition is really to establish the will, which is never done without great caution; and there is not in the present case the usual presumption which arises from long possession by the devisees, and acquiescence therein by the heirs. All that I can do at present in reference to this part of the case is, to direct that the heir who resides in this Province be served with a notice of the petition, containing explicit information as to the object of the notice, in addition to what such notices by the referee usually contain. The petitioners should also shew, by affidavit, what they know of the other heirs, and of their names and residences; and whether these other heirs know anything of the will. These affidavits should be as full as possible. The case may be found such that service on the co-heir resident here will be sufficient; but in that case *viva voce* evidence of the due execution and validity of the will will be indispensable. I shall give an appointment for the purpose of taking this evidence after the expiration of the time for Mrs. Thompson to appear.

5. If practicable, some of the *cestuis que trust* should join in the petition on behalf of themselves and all others, in case Mrs. Thompson's name is struck out as a petitioner; as the executors have a power only and no estate in the property.

Gamble & Boulton, Solicitors for Claimant.

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**Ex PARTE ARTHUR PALMER.***Quieting Titles Act—Notice.*

The effect of a Certificate under the Act is so stringent that great particularity must be exercised by the Court in seeing that all parties entitled to notice have been duly and regularly served, and that strict proof of such service be given.

The entry in a docket of a deceased Solicitor stating service of a notice of application was considered insufficient evidence of notice having been given to all the tenants entitled to notice.

[January 5, 1869.]

**MOWAT, V. C.**—This is an application under the Act for Quieting Titles, and the following defects have still to be supplied:—

1. The notice of the application was directed to be served on the tenants in possession of the property; and the proof given of such service consists of entries by a deceased Solicitor in the docket of his firm, stating service of a “notice of application.” But there is no evidence that the notice so served was the notice directed and signed by the referee, or that the persons served were all the tenants, or indeed that they were tenants at all. On the former point, an affidavit by the surviving partner of the deceased Solicitor might do, stating his belief and the grounds of it. On the other point, an affidavit should be procured from some one who is aware who the tenants are. It is quite consistent with the present evidence that some only of the tenants were served. The effect of a certificate is so stringent that we must be made sure by evidence in all cases that all persons entitled to notice have received notice; and it will not do to dispense with evidence, under the moral conviction which arises from the respectability of the petitioner and his Solicitors.

2. I see no proof of payment of last year’s taxes.

*George Palmer, Solicitor for Claimant.*

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## EX PARTE JOHN C. CHAMBERLAIN.

*Quieting Titles Act.*

Under the Act for Quieting Titles, every material fact which is capable of being proved by independent evidence, ought to be proved: thus, it is necessary to prove search for missing deeds; an affidavit by petitioner himself of search for such deeds is insufficient.

Where a title by possession is relied on by a petitioner under the Act, notice of his application must, under the direction of the referee, be given to the persons who but for such possession would be the owners, unless it has been shewn that due inquiry has been made for such persons without success.

The Court has no jurisdiction to grant a certificate, unless all taxes except those for the current year have been paid.

[January 15, 1869.]

**MOWAT, V. C.**—This is an application under the Act for Quieting Titles.

1. The early deeds are not produced and the evidence of due search for them rests in part on the affidavit of the petitioner alone. I have frequently pointed out that under the Act every material fact, which is capable of being proved by independent evidence ought to be so proved (*Hobson v. Bell*, 2 Beav. 422; Sug. V. & P., 14 Ed. ch. 11, sec. 2, pl. 32, P. 422; Dart on Vendors, 3rd Ed. 222, 223.) Affidavits should be procured from the parties whose information the petitioner gives in his affidavit, so far as this is practicable, and has not been done already.

2. It appears from a memorial in the Registry Office that the patentees conveyed the lot in question to Archibald McDonell of the Township of Marysburg, yeoman; and that McDonell afterwards conveyed the west half to Hazelton Spencer, through whom the petitioner traces his title to that half. But no conveyance from McDonell of the other half, viz., the east half, has been registered or is proved; and the petitioner's title to the east half depends on length of possession by him and those under whom he claims. Now it has been invariably held, that, where a title by possession is relied on by a petitioner under the Act, notice of his application must, under the direction of the referee, be given to the persons who, but for such possession, would be the

owners—unless it is shewn that due enquiry has been made for such persons without success. A vendee out of Court, in purchasing a title of that kind, can seldom safely omit making enquiries of the owners of the paper title, before completing his purchase, as the effect of possession in giving the occupants a title depends on so many circumstances. *A fortiori*, a judicial proceeding *in rem*, which bars all the world, can seldom, if ever, be permitted to go to a conclusion without notice to the owners, or apparent owners, of the paper title, wherever such a notice is practicable. The petitioner states in one of the affidavits, that Mr. Kirkpatrick, of Kingston, was the Solicitor for McDonell's estate; and that he informed the petitioner that McDonell had died many years ago, unmarried. These are material facts, and should be shewn by the affidavit of Mr. Kirkpatrick himself, or by some other independent testimony, in addition to the petitioner's own affidavit. Mr. Kirkpatrick can probably inform the petitioner who the heirs or other representatives of McDonell are, and where they are now to be found.

3. I see no evidence of payment of the taxes for 1868. The Statute is express (sec. 16) that before a certificate of title is granted, "satisfactory evidence shall be given by certificate, affidavit, or otherwise, that all taxes, rates, and assessments for which the land is liable have been paid, or that all except those for the current year, have been paid." The certificate, when the petitioner shews his right to it, may be given subject to the taxes for 1869, but must be free from all prior taxes.

4. The notices which the 504th General Order requires to be posted at the court house and nearest post office are not shewn by the affidavit to have been continued for the period directed by the referee, though the continuance for such period is as necessary under the order as the original posting of the notice.

*Jones Bros., Solicitors for Claimants*

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**McDONELL v. MCKAY.**

*Payment of money—Money remitted by mail.*

Where money collected by the Sheriff had been posted on the evening of the 27th November, addressed to the plaintiff's Solicitor, but not received by him till after the defendants had moved for a stay of proceedings :

*Held*, that the money was constructively in the possession of the plaintiff's Solicitor as soon as it had been duly mailed; and therefore a motion to refund it was refused with costs.

The defendants, under the decree herein, had been ordered to pay the plaintiff his costs of suit. The plaintiff accordingly had his costs taxed and issued execution for them. The Sheriff made the amount and posted it to the plaintiff's Solicitor on the evening of November 27th. On the same day, the defendants got leave to move on the following day for an order to stay proceedings on the execution, pending the defendants' proceedings on appeal.

This motion stood over till the 7th of January, previously to which the defendants perfected security for costs of appeal, and gave notice of a motion requiring the plaintiff's Solicitor to refund the money—and the two motions were heard at the same time.

*Mr. J. A. Boyd*, for the defendants, contended that the plaintiff should have taken no further steps after being served with the notice of motion, and that, in fact, the money could not have been received till the motion came up for hearing on the 28th of November. He referred to the Consolidated Statutes of Upper Canada, ch. 13, sec. 18.

*Mr. McGregor*, for the plaintiff, argued that the money was constructively in the hands of the plaintiff's Solicitor as soon as the Sheriff had mailed it, and that, as no notice whatever had been given of the defendants perfecting security till after the posting; the 18th section of the Act did not apply, as it applies, in express terms, only to cases where the money is still in the Sheriff's hands when the security has been completed.

THE SECRETARY, after considering the matter, delivered the following judgment:—

I think the money must be treated as having been in the hands of the Solicitor on the 27th, when the letter was posted. Section 18 applies to costs, if the 4th sub-section of section 16 does, and the Court has held it does.

*Motion refused with costs*

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EX PARTE ALEXANDER WRIGHT.

*Act for Quietting Titles.*

1. Proof is indispensable either that possession has always accompanied the title under which petitioner claims—or, that some sufficient reason exists for not adducing such proof.
2. Where the former owner, a person of the same name as the petitioner had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, the Court called for explanations, as it was necessary to take care that the Act was not being made use of for any improper purpose, such as defeating the creditors of the owner by getting the title of a voluntary grantee quieted before the creditors are aware of the attempt to defraud.

[January 28, 1869.]

MOWAT, V. C.—This is a petition under the Act for Quietting Titles. Mr. Turner has reported in favor of a certificate, but I cannot at present act on this report.

1. The referee has overlooked the 501st Consolidated Order, which requires a petitioner under the Act “to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise; or to shew some sufficient reason for dispensing with such proof either wholly or in part.”

2. The petitioner acquired his title a few days only before filing his petition, and without (so far as appears) having taken possession of the property. The deed to him is dated 21st September, 1868; the petition was filed on the 9th October; and the deed, though of prior date, was not registered until the 12th October. The grantor is Samuel

Wright, who is described as formerly of the township of Toronto, in the county of York, yeoman, and now of the township of Brant in the county of Bruce; and the petitioner, the grantee, is described as of the village of Acton, gentleman. The special reason for desiring a certificate does not appear; the title is simple; all the title deeds are produced; and the Act has not yet been taken much advantage of by owners, except where deeds have been lost, or where the title is complicated, or where some other special reason apparent on the papers exists for proceeding under the statute. Now great care must be used that the Act is not made use of for any improper purpose, such, for example, as defeating the creditors of the owner by his making a conveyance to a son or other relative, and getting the title of the grantee quieted under the Act before the creditors are aware of the attempt to defraud. The notice which is published before granting a certificate is some protection against such a perversion of the Act where the creditors are likely to see the advertisement; but in the present case it happens to have been in a Barrie newspaper that the notice was published, the property being situated in the county of Simcoe, of which Barrie is the chief town; and the grantor does not appear to have ever lived in that county, nor is there the slightest reason on the papers for supposing that, if he has any creditors, they are in that county or in any place where the Barrie paper circulates.

In view of all these circumstances, I think that, before granting a certificate, which is to exclude the claims of all the world, it would be but a reasonable precaution to require that some evidence be given of the relationship (if any) of Samuel Wright and the petitioner; that at the time of the conveyance the grantor owed no debts, or was not insolvent or in embarrassed circumstances, or as the case may be; that the transaction was a *bona fide* sale for the consideration stated, or whatever the fact may be; that the conveyance was not made to defeat or delay creditors; and that the petition has not been filed to defeat the apprehended claim of any creditor or creditors or of any other person, or to

prevent any apprehended claim from being set up to or in respect of the property by any person who is not aware of the proceedings. The evidence on these points should include affidavits by both the petitioner and Samuel Wright; but their affidavits should as far as practicable be supported by the testimony of indifferent persons of respectability.

On the evidence being furnished as thus required, and its being found satisfactory, I think the certificate may be granted agreeably to the referee's report.

[*Note.—The evidence required was subsequently furnished, and the certificate was issued.*]

*Patterson, Harrison & Bain, Solicitors for Petitioner.*

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EX PARTE WILLIAM LYONS AND JANE HIS WIFE.

*Act for Quieting Titles.*

1. Where property is claimed by or on behalf of a wife under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to shew that it was *bona fide*, and was such that the husband's creditors could have no claim on the property; the affidavits for this purpose should be by the petitioners, and should be satisfactorily corroborated by disinterested persons of known credibility.
2. Where the petitioner claimed the north-east part of a lot under a will devising the north-west part, and it was alleged that the word "north-west" was a clerical error in the will, all the parties interested in the opposite view were required to be served with a notice of the application, signed by the referee or inspector, unless a case should be made for dispensing with service on some of them.
3. Where the petitioner's title was acquired within two years before the filing of the petition, the Sheriff's certificate was required as to executions against the prior owner, as any such executions, if duly renewed, might be binding on the land.

[January 30, 1869.]

MOWAT, V. C.—This is a petition under the Act for Quietting Titles. The petition asserts that the property (the north-east quarter of number eleven, in the Gore of the

township of Woodhouse) belongs to the wife, and prays that her title may be investigated and declared under the Act.

1. The wife's title is derived under a conveyance to her from James B. Woolnough, dated twenty-third January, 1867, and expressed to be in consideration of \$5,500, part of which sum (\$2,000) was secured by a mortgage. The petition was filed on the eighth July, 1868. Now, property purchased and paid for by a husband, and conveyed to his wife, is in equity subject to his debts; and in such a case a certificate in favor of the wife would either exclude the claims of his creditors or greatly embarrass them in following the property (29 Vic. ch. 25, ss. 42, 43). In view of this danger, where property is claimed by or on behalf of a wife under a conveyance made to her during coverture, an explanation of the transaction should be given on oath, to shew that the transaction was *bona fide*, and such that the husband's creditors can have no claim on the property. In a recent transaction like this the necessity for such a precaution is all the more urgent. Without such evidence, the certificate, if granted at all, must be declared to be without prejudice to the claims of any present or future creditors of the husband against or in respect of the property. The affidavits should be by the petitioners, and should be satisfactorily corroborated by disinterested persons of known credibility.

2. Woolnough's title was under a conveyance from Stephen Dudley Owen, who claimed as devisee thereof under the will of his father Abner Owen. This will is not produced, nor any copy of it, but an extract only, which the County Registrar certifies to contain the only portions of the will which relate to the property. The opinion or certificate of the Registrar on that point is not sufficient—the production of the probate, or of a certified copy of the whole, will is indispensable (*Sugden's Vendors*, 14 ed. p. 414). It appears that the will does not profess to devise the north-east part *eo nomine* to Stephen; and the petitioner's contention is, that a parcel devised to Stephen but described

in the will as the north-west corner is so called therein by mistake, and that the remaining part of the clause, in connexion with certain evidence which is given, is sufficient to shew this, and to make the devise effectual as to the parcel claimed by the petitioners. It is said, also, that this construction has always been recognized by the testator's other heirs. There is sufficient evidence, if uncontradicted, to support the petitioner's contention; but where a title depends on establishing such a mistake as they allege, the parties interested in the opposite view should be served with a notice of the application, signed by the referee or inspector. The published notices are not intended to dispense with the service of individual notices on those who should be made aware of the proceedings, but only for the information of possible claimants whose claims are not indicated in or suggested by the petitioner's papers. (See 13th, 14th and 15th sections of the Act). It must be shewn by affidavit who all are interested in resisting the petitioner's construction of the will; and all such persons must be served unless a case is made for dispensing with service on some of them.

3. The Sheriff certifies under date 15th June, 1868, that there were then no executions in his hands against the lands of the petitioners or of either of them. This certificate does not go far enough. The certificate of the filing of the petition was not registered until the 2nd September, 1868; and there may have been executions in the interval between the 15th June and 2nd September. The certificate should be of no execution up to and inclusive of the latter date. But it should not be confined to executions against the petitioners; for their title accrued in January, 1867, only, and executions against the previous owner, James B. Woolnough, if duly renewed, would bind the land. James B. Woolnough acquired his interest on the 22nd February, 1861, more than seven years ago; and I may presume, without evidence, that there are not any renewed executions against the antecedent owners.

4. The affidavit of Mr. Lyons is the only evidence that possession has always accompanied the title under which the

petitioners claim (Consolidated Order No. 501). It was proper for the petitioner to state the fact in his affidavit, but there must be evidence on the point by disinterested persons. Every material fact on which a title depends, that can be proved by documentary evidence or disinterested witnesses, must be so proved. That is the general rule on an investigation between a vendor and purchaser; and certainly cannot be disregarded where by the effect of the desired certificate all claims of other persons are forever barred.

*J. H. Ansley*, Simcoe, Solicitor for Claimant.

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#### EX PARTE SESSIONS.

*Act 29 Vic. sec. 58.*

Under the Statute to amend the law of property and trusts, the Court made an order approving of a proposed sale to a partner of an intestate's interest in the partnership assets.

[February 12, 1869.]

This was an application by an administrator, under the 81st section of the Act to amend the law of Property and Trusts in Upper Canada, for the advice of the Court, respecting the disposal of the interest of Jared Dana Sessions, deceased, in the partnership stock of the firm of Sessions, Turner & Co., wholesale dealers in boots and shoes in Toronto.

It was stated, that the intestate died on the 23rd of June, 1868, leaving a widow and three children, two daughters aged thirteen and eight respectively, and a son four years old: that the petitioner is well acquainted with the business and affairs of the said firm; that the surviving partners are willing to pay all the liabilities of the partnership, or of the intestate in respect thereof, on or before the first of May next, and to pay the administrator the further sum of \$27,000, with interest at ten per cent., from first January, 1869, by four equal instalments on the first day of March,

June, September, and December, of the same year, for the interest of the intestate in the stock, debts and good will of the firm ; that to secure the same they will undertake to continue the business under the firm of Sessions, Turner & Cooper, to keep their stock covered by insurance, to keep full and faithful accounts of all their transactions in the business, and to render monthly statements thereof to the administrator ; that they further agree, that the administrator, and any persons appointed by him for the purpose, may at all times enter on the premises where the business is carried on, examine the state and progress of the business, inspect all books and papers relating thereto, and do all things necessary to obtain full information as to the business ; that the partners (Turner and Cooper) shall at all times supply all such information, and give all such assistance in the examination of the said business as shall be required by the administrator or on his behalf ; that in case of default being made in the payment of any of the instalments, or in rendering the monthly statements, or in keeping proper accounts, or in case it shall appear to the administrator that the business is not carried on with prudence and energy, and that by reason thereof the payment of the said moneys or any part thereof is endangered, the administrator may enter into possession of all the assets of the business, and take such steps for winding up the same, or otherwise for obtaining payment of the said purchase money and interest, whether the same has become payable or not, in the same manner as before the sale he might have done for the purpose of realizing the interest of the intestate in the partnership assets ; that Turner and Cooper will assign to the administrator all the stock in trade and assets of the new business, to have and to hold the same jointly with themselves, for the same interest therein as the deceased had in the assets of the late partnership until the purchase money aforesaid and all the liabilities of the late partnership, or of the intestate in respect thereof are fully paid ; and that the agreement shall not be construed to make the administrator a partner in the business to be carried on.

The petitioner represents, that the sum offered is a considerably larger sum than could be realized for the interest of the intestate by any forced winding-up of the business, or by stopping the business for the purpose of winding it up; that he is satisfied that it will be for the advantage of the next of kin of the intestate to accept the said offer, and that by doing so a considerably larger sum will be realized for the said estate than from any other mode of winding up the business. He states that the business is perfectly solvent and in active and successful operation.

*Mr. J. C. Hamilton*, for the administrator who petitioned.

*Mr. G. Murray*, for infants and others.

MOWAT, V.C.—I think that the new business should not be carried on in the name of the deceased or his representatives, and that the proposed style of the firm “ Sessions, Turner & Cooper” is objectionable. There is really to be no partnership interest; but the use of the name “ Sessions,” with the sanction of the Court, might, perhaps, in case of misfortune, raise some inconvenient questions with third persons, who may become creditors of the firm. I presume this is not deemed an essential part of the proposed arrangement: If the petition states, and states truly, all facts that are material, I think, with this modification, that the proposed sale is a proper one. It will be remembered that (to use the language of the Court in *Re Barrington's* settlement (1 J. & H. 143), “under this statute, the facts must be taken to be as they are stated in the petition of the trustees who take the risk of any mis-statement;” and a material omission stands on the same footing as an express mis-statement. Counsel for the widow, and for the guardian of the children appointed in the American States where the children are domiciled, appeared, and expressed the concurrence of all concerned in the propriety of the proposed sale. Having reference to this fact and to the statements of the petition, an order may go declaring it to be the opinion of the Court that it is fit and proper and for the benefit of all

the persons interested in the estate of the deceased, that a sale to the surviving partners on the terms set forth in the exhibit (which should be filed), with the modification I have mentioned, should be carried into effect. (See the form, *Seton on Decrees*, 4th ed. 773, 774).

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#### ROMANES v. HERNS.

*Practice—Form of notice of motion for leave to appeal against report.*

On a motion for leave to appeal against a Master's report after the fourteen days given by the General Orders, it is not necessary to state in the notice of motion the points on which the party desires to appeal; provided, they appear in the papers filed in support thereof.

[March —, 1869.]

The defendants filed the Master's report on the 19th December, 1868. The plaintiff's solicitor, not being aware of this, filed a duplicate on the 9th of February, 1869, and gave notice of motion by way of appeal against the report. Learning afterwards from the defendant's solicitor of the filing of the report in December, the plaintiff's solicitor abandoned his motion and paid the costs thereof; and then moved for leave to appeal notwithstanding the lapse of time.

*Mr. McLennan*, for the motion.

*Mr. Wells*, contra, objected that the notice did not state the grounds of the intended appeal.

The affidavit of the solicitor stated that the points on which the plaintiff desired to appeal, appeared in the notice of motion formerly served, and a copy of which was referred to in the affidavit and was marked as an exhibit. The deponent stated that he believed the grounds of appeal therein stated were reasonable and well grounded.

*MOWAT*, V. C., held that the grounds of appeal sufficiently appeared by reference to this affidavit and the notice; and that it was therefore unnecessary to set them forth in the notice of motion for leave.

## DUDLEY v. BERCY.

*Vendor and purchaser—Rents and profits, &c.—Occupation rent.*

Where there had been considerable delay in completing the title to property, and the purchaser paid the purchase money into Court without prejudice, it was held improper in charging the vendors with the rents during the interval to direct the Master, in fixing the amounts, to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration and damage to the property, except such as occurred through the act or default of the vendors.

(FEBRUARY 9TH, 1869.)

This was an application on behalf of John Strathy, purchaser at the sale in this cause on 8th May, 1868, for an order; that it might be declared that he was entitled to his costs of the reference to the accountant of this Court as to the title to the parcel No. 2, of the lands and premises purchased in this cause by him, and that it might be referred to the Master to tax such costs—and also that it might be declared that he was entitled to be let into possession of the said parcel of land and premises so purchased by him, as from the quarter day next preceding his purchase, and that he might be declared entitled to the rents of the said property as from the quarter day next preceding his said purchase, and in that event that it might be referred to the Master of this Court to ascertain the amount of the said rent to which the said John Strathy was so entitled as aforesaid, or to set an occupation rent in respect of the said property from the quarter day next preceding his said purchase to the period when the said John Strathy can make his repairs, and let the said property—or to the period when he shall be let into possession thereof as to this Court might seem just, and that in setting such occupation rent the said Master might have regard to the amount at which the said premises could have been rented by the said John Strathy, had the said vendor given him possession thereof, and that the said vendor might be charged with such rent or occupation rent as aforesaid, and that the said Master might ascertain the damage done to the said property through the said vendor's

default, and that the said John Strathy might be allowed therefor or for such other order in the premises as to this Court should seem just, regard being had to the fact that the said John Strathy had performed his contract of purchase in every particular, and paid in his purchase money according to the conditions of sale in that behalf.

*Mr. Snelling*, for John Strathy, the purchaser, as to the costs of the reference as to title, cited, *Smith's Chy.* P. 596; *Perkins v. Ede*, 16 Beav. 268; *Fielder v. Higginson*, 3 V. & B. 142; *Reynolds v. Blake*, 2 S. & S. 117. As to the occupation rent:—*Sugden*, V. & P. (13 ed.) 519; *Acland v. Gaisford*, 2 Mad. 28, 33, and cases there cited: *Wilson v. Clapham*, 1 J. & W. 36; *Montgomery v. Cosslett*, 2 Jones, 174. As to deterioration and damage:—*Seton* on Decrees, 615, 620; *Foster v. Deacon*, 3 Mad. 394; *Binks v. Lord Rokeby*, 2 Sw. 222, *Ferguson v. Tadman*, 1 Sim. 530, 533; *Regents Canal v. Ware*, 23 Beav. 575, 588; *Dart's V. & P.* 767; *Sugden*, V. & P. (13 ed.) 82, 519, 537; *Smith's Chy.* P. 594, 595; *Twigg v. Fifield*, 13 Ves. 517; *Garrick v. Earl Camden*, 2 Cox. 231. As to motion being proper for Chambers and not Court:—*Shinners v. Graham*, 1 Cham. R. 212; and he referred to the dates of proceedings:—Sale, 8th May, 1868; demand of contract, 13th May; its delivery, 11th June; objections and requisitions, delivered 19th June; order to pay in, 30th June; Strathy's reference to accountant as to title, 3rd September; certificate shewing good title by accountant, 19th October. The conditions of sale were the ordinary conditions of the Court.

*Mr. Blain*, for plaintiff (vendor) and Taylor a subsequent incumbrance entitled to part of the purchase money, cited *Robinson v. Page*, 4 Rus. 121; *Esdaile v. Stephenson*, 1 S. & S. 122; *Townsend v. Campernown*, 1 Y. & J. 449; *Dart's V. & P.* 187, 220, 407, 408; and referred to the difficulty in proving the vendor's title, and to an offer to give possession to Strathy.

THE SECRETARY.—I think the purchaser must have his costs of his reference, indeed this was not disputed on the motion ; as to the other matters embraced in the notice of motion, there should be a reference to the Master to enquire as to rents or to set an occupation rent following the usual form, no matter whether the vendors were willing to let the purchaser into possession or not, he was not bound to take possession until the enquiry as to title was concluded. So I cannot say that he acted improperly in refusing to take possession. The purchaser is entitled to the costs of the reference.

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#### SAME CASE IN APPEAL.

[April 2 and 7, 1869].

This was an application on the part of the vendor to vary an order made in Chambers, obtained at the instance of John Strathy, a purchaser of one of the lots sold in this cause on the 8th day of May, 1868.

The order made in Chambers declared that the said John Strathy was entitled to his costs of the reference to the accountant of this court, as to the title to the parcel number two of the lands and premises so purchased by the said John Strathy as aforesaid, and ordered that it be referred to the Master of this court to tax such costs and to certify the amount thereof ; and it also declared that the said John Strathy was entitled to be let into possession of the property so purchased by him as aforesaid ; and it ordered that the plaintiff do give him such possession accordingly forthwith ; and it also declared that the said John Strathy was entitled to the rents of the said property as from the twenty-fifth day of March last ; and it ordered that it be referred to the Master to set an occupation rent in respect of the said property from the said last mentioned day to the period when the said John Strathy should be let into possession of the premises as aforesaid, and

that in settling such occupation rent the Master should have regard to the amount at which the premises could have been rented by the said John Strathy, had the plaintiffs given possession thereof ; and it was declared that the said John Strathy was also entitled to be compensated by the plaintiffs for the deterioration and damage (if any) done to the property so purchased by him, as aforesaid, which had been occasioned thereto during the default and delay of the plaintiff in making out the title to, and in giving such possession of the property as aforesaid ; and it was ordered that it be referred to the Master to ascertain such deterioration and damage, and to fix the amount in value thereof and the allowance to be made to the said John Strathy in respect of the same, and as compensation therefor ; and it was ordered that the costs of the said references in this order directed, and of this application, be allowed to the said John Strathy, and that the Master do tax the same, and the said John Strathy having paid his purchase money and interest into court, it was ordered that the costs respectively directed to be paid to him by this order, the occupation rent, and the amount of the deterioration and damage, if any, which the said Master should find proper to allow, when and as soon as the same should respectively be certified by the Master, be paid to the said John Strathy out of his said purchase moneys so standing in court to the credit of this cause.

This order was sought to be varied on the following grounds :

1. The said order ought not to have directed the Master of this court to set an occupation rent from the twenty-fifth day of March last, in respect of the property purchased by John Strathy in this cause, but from the 30th day of June last, the date of the order under which the said John Strathy paid into court his purchase money, when all matters in difference as to rents for the said property and the interest accrued on the said purchase money were finally settled and adjusted, and at all events from the 8th day of June

last, being one month after the sale of the said lands, at which time the said John Strathy was to be let into possession under the conditions of such sale.

2. The order should not have directed the said Master to have regard to the amount at which the said premises could have been rented by the said John Strathy, had the plaintiff given him possession thereof in setting the said occupation rent.

3. The order ought not to have declared the said John Strathy entitled to be compensated by the plaintiff for the alleged deterioration and damages done to the said property so purchased by the said John Strathy.

4. The costs of the application under which the said order was made, and the reference directed thereby, and, at all events, the costs of the latter, ought to have been reserved by the order until after the Master should make his report, and in any event the question as to the said occupation rent and deterioration and damage ought to have been disposed of on further directions, which ought to have been reserved by the order.

5. The said John Strathy is entitled only to costs of the reference as to title up to the time when a good title was shewn, and he should pay the costs of the plaintiff and Robert W. Taylor, subsequently incurred.

*Mr. Blake*, Q. C., for the plaintiff (the vendor) appealing, referred to the following authorities: *In re Thompson, Biggar v. Dickson*, 2 Chamber R. 196.

*Mr. Snelling*, for John Strathy, the purchaser, contra, contended that the appeal was too late, the notice not being returnable within fourteen days from the date of the order made in Chambers; this order was dated on the 9th day of February, and the notice returnable on the 25th February, referring to Consolidated Order 329, and *Jackson v. Gairdner*, decided by Mowat, V. C., [reported in this volume,] the question being whether the fourteen days mentioned in the order 329 should be reckoned from the date of the order appealed from, or from the

date of the *entering* of the order. The purchaser performed his part of the contract; he paid in his purchase money; he could not get possession; great delay occurred in furnishing abstract, and making out title. The particulars of sale, coupled with facts disclosed by the affidavits, went far to shew that constructively at least the vendor was in possession, and if so, he was properly chargeable with an occupation rent, at any rate he should not be precluded from shewing that the vendor was liable to be charged with an occupation rent, by reason of his having constructive possession of the property, and that the relief to the purchaser should not be limited to the reception of the rents the vendor may have received; and the vendor conceded by his notice of appeal that he was chargeable with an occupation rent; the only question between the parties being, when it should commence. (See ground of appeal No. 1.)

The case was one of great hardship to the purchaser, as the chief value of the property (a store on Wellington Street) was its rental, and the purchaser, by the default of the vendor, had lost nearly a year's rent. In any event he should be entitled to compensation for being kept out of possession; until good title shewn he could not safely take possession, and was justified in not doing so.

The following authorities were referred to on behalf of the purchaser as supporting the order appealed from; *Dart V. & P.* 767; *Sugden V. & P.* (13 ed.) 82, 519, 52; *Seton on Decrees*, 615, 620; *Acland v. Gaisford*, 2 Mad. 28, 33; *Foster v. Deacon*, 3 Mad. 394; *Wilson v. Clapham*, 1 J. & W. 36; *Ferguson v. Tadman*, 1 Sim. 580, 533; *Fry Spe. Per.* 386.

**MOWAT, V. C.**—The delay in furnishing the abstract, and afterwards in making out the title has not been explained satisfactorily. But the order appealed from goes further in favor of the purchaser than the authorities warrant. The order should have directed account of rents received, or which, ~~but~~ for the vendor's default, might have been received

after the time appointed by the order for the completion of the sale. The general orders would have enabled the Master, under this reference, to charge the vendors with whatever the purchaser was entitled to claim; and the direction to have regard to the amount at which the said premises could have been rented by the said John Strathy, had the vendor given him possession thereof, should be omitted.

It not being alleged that the vendors were in possession, there cannot be a direction to charge them with an occupation rent.

There is no reason for naming the 25th March as the day from which the vendors are accountable.

The reference as to deterioration and damage must be confined to such as occurred through the act or default of the vendors.

The costs of the reference, as to rents and deteriorations, should be reserved; but if the reference is fairly prosecuted, the purchaser will be entitled to the costs, almost of course. No costs of the appeal.

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#### WATSON v. HENDERSON.

*Amending decree—Jurisdiction of Secretary—Filing affidavit.*

A decree can only be amended on an application in Chambers, when it is not drawn in accordance with the judgment, or some necessary consequential direction has been omitted.

The plaintiff has, in the absence of any expression of the Court, a right to take the reference to the place where the bill was filed.

[March 24, 1869.]

*Mr. Hodgins* moved on notice to vary the decree in this cause, and to change the reference.

He urged that the Master at Whitby was interested in the matter at issue, having been concerned as attorney in some suit at law between the parties. He referred to *Seton* on Decrees, 101. He objected also that the decree contained no direction as to setting off certain payments.

*Mr. S. H. Blake*, contra, submitted that the grounds on which the decree was complained of had only been brought to his notice at a late hour. He objected that the Secretary had no jurisdiction, except to make the decree in accordance with the judgment, he could not consider questions which had been already brought before the court, or new questions which were now brought up for the first time by affidavit. He had no authority to look into, or consider the points decided in the decree. The matter had been proceeded with in the Master's office, and the report was nearly ready to be signed, and they now came to ask a change of reference. The alleged interest of the Master was merely nominal, his name appearing in some suit at law years ago, in which one of the parties was interested. He cited *Stirling v. Riley*, 9 Grant, 343.

THE SECRETARY.—I shall look at the Judge's book to see if anything is said as to place of reference. If nothing is said, I think I must refuse the application. I can amend a decree only where it is not drawn in accordance with the judgment, or where some necessary consequential direction is left out. I cannot alter a decree on a matter not decided by the Judge. As to the setting off, I think the Master can take the account of it without any special direction; and as to the taxation of costs, though clumsily expressed, the decree may be construed for taxation of incumbrancer's costs only, which is all that plaintiff is attempting under it.

[After reference to the Judge's book the Secretary added:] On reference I do not find that the Chancellor directed the reference to any particular place. The plaintiff has, in the absence of any expression of the Court, a right to take the reference to the place where the bill was filed, and I do not think sufficient is shewn to induce me to change it.

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**McDERMID v. McDERMID.***Cross-examining a defendant.*

Where a defendant lived at Hamilton and the bill was filed at Toronto, plaintiff took out an appointment to cross-examine the defendant before the Deputy Master at Goderich—the appointment was set aside with costs.

[March 30, 1869.]

*Mr. Moss* moved to set aside the appointment of the Deputy Master at Goderich, for the cross-examination of the defendant on his answer. The bill had been filed at Toronto, the venue laid at Goderich, the defendant lived at Hamilton, and had received barely forty-eight hours' notice of the appointment.

*Mr. J. Hoskin*, contra.

**THE SECRETARY.**—I think I should set aside the appointment, it seems an abuse of the process of the Court to drag defendant from Hamilton to Goderich for cross-examination, when he lives in Hamilton, and the bill is filed in Toronto.

As to the question of costs and conduct money, I discharge the appointment with costs, if they exceed the conduct money paid the defendant, the plaintiff to pay the difference; if otherwise, defendant to refund the difference.

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**PATTERSON v. KENNEDY.***Examining a defendant on his answer.*

A defendant is liable to cross-examination on his answer to a bill filed by a wife and co-plaintiffs against her husband.

[April, 9th. 1869]

*Mr. George Murray* moved for an order to compel the defendant to attend before the Master in the county, at his own expense, and submit to examination, he having refused to answer questions put to him by way of cross-examination on his answer.

*Mr. A. Hoskin*, contra. The defendant is the husband of the plaintiff; his evidence cannot be used for or against her, and he is therefore not liable to cross-examination Con. Stats. U. C. p. 402; *Fry on Evidence*, 902, were referred to.

**MOWAT, V. C.**—The husband would have had to answer interrogatories in a bill framed under the old system of pleading. The present practice of cross-examining on the answer is a substitute for interrogatories in the bill, and I see no reason why he should not be subject to cross-examination. In a litigation between a wife and third parties, the husband cannot be a witness; but if the litigation is between the husband and wife, by the one against the other, no such rule applies. The fact that there are co-plaintiffs who are interested with the wife makes no difference.

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#### LAWSON v. CROOKSHANK.

##### *Extending time for payment.*

An extension of time for payment of money appears to be granted only in cases where a forfeiture would result from its non-payment.

[April 12th, 1869.]

*Mr. Lash*, for the defendant, moved for an extension of time limited for the payment of certain moneys found due from the defendants as trustees and executors. It was stated in the affidavit that one of the defendants had laid by the money for the purpose of paying it into Court, when a fire occurred and the same was lost to him; and under the circumstances, he asked the indulgence of the Court in extending the time for payment.

*Mr. McDonald*, contra.

**THE SECRETARY.**—I cannot grant the relief asked unless some authority is shewn for extending time for payment of money, when no forfeiture will result from the non-payment.

*Motion refused with costs.*

## MILLS v. CHOATE.

*Opening foreclosure—Order for possession—Costs.*

Suing at law for part of the mortgage money, for which the note of a third party had been given as collateral security, will not open the foreclosure if such suit is brought before foreclosure completed.

On a motion for delivery of possession, the Court will not as a general rule look behind the final order for foreclosure.

Where costs were not asked for by the notice or on argument, and no demand of possession was proved, the order for delivery of possession was made without costs.

[April 16, 1869.]

*Mr. S. H. Blake*, moved for delivery up of possession by defendant of the property foreclosed in this cause.

The final order had been granted three months ago—the defendant was still in possession.

*Mr. Hodgins*, contra. The state of the account is not as represented in the affidavit of the plaintiff, on which the final order was granted. The affidavits shewed \$7800 as due and unpaid, whereas certain moneys had been secured by a note of a third party, on which an action had been brought. Nothing was said as to this suit when the final order was applied for. The plaintiff ought to have given the Court the fullest information as to the state of the account. See *Fisher* on Mortgages, 597, 599, and *Cook v. Saddler*, 2 Vern. 235.

THE SECRETARY.—I do not see how I can go behind the final order, if improperly granted you can move to set it aside.

*Mr. Hodgins*.—A payment, such as is here shewn, opens the foreclosure and a new account must be taken, and no order for possession can therefore be made.

THE SECRETARY.—That is where the action is brought after the foreclosure.

*Mr. S. H. Blake*.—Suing will open foreclosure, it is true but that is where foreclosure has been obtained *first*. There is nothing to prevent the plaintiff recovering what he can at law *first*, and foreclosing for the balance. The only object of the opposition to this motion, is to enable the defendant to get another crop off the ground. There is no prospect of

his redeeming, and it is immaterial to him how the account stands—at any rate, nothing has been recovered in the action at law. The case in *Vernon* does not support the defendant's position ; it is only authority in case the suit is brought after foreclosure. (See note to the case.) The final order is good until discharged. The Courts will not open foreclosure on slight grounds. *Read v. Smith*, 14 Grant, 250.

**THE SECRETARY.**—I think I must make the order for delivery of possession. The final order stands, and while it does, I must carry it out.

The order was made without costs, it not being shewn that any demand of possession had been made, and costs not having been asked for by the notice or on the argument.

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#### CAMERON \*V. CAMERON.

*Extension of time for payment of mortgage money—Interest.*

Six months further time was given for payment of the mortgage money, on an application made the day before the money was due, when it was shewn that the property would be greatly enhanced in value in the meantime by the construction of a contemplated railway, on payment of interest on principal and interest due and the costs of the application.

[April 15, 1869.]

**Mr. J. Hoskin** moved, on notice, for the extension of the time appointed for the payment of the amount found due the plaintiff. The decree was for sale ; the money was payable on the following day ; if time was given the defendant would be saved the sacrifice of his property. The land was in Beaverton, which it was expected would be one of the *termini* of a projected railway, and the land could be sold to much greater advantage in a few months. He cited G. V. V. 2 Cham. R. 33, and *Howard v. Macara*, 1 Cham. R. 72.

**Mr. A. Hoskin**, contra. The indulgence can only be granted on payment of costs and interest, that is interest on the interest now due as well as the principal.

**THE SECRETARY** granted the order on payment of interest on the principal and interest due and the costs of the application.

**GRAHAM v. MACHELL.***Postponing hearing and examination—Costs.*

A motion was granted for postponing the hearing and examination of a cause, on the grounds of the absence of a material witness, after notice of hearing has been given, although the cause had been at issue for some months previous.

The costs of such a motion are costs in the cause.

[April 19, 1869.]

*Mr. Morphy* for defendant, moved to postpone the hearing and examination on the grounds of the absence of two material witnesses in California.

The affidavits filed shewed the absence of the two witnesses, that their evidence was necessary and material, and defendants could not safely proceed to hearing without it. It was also stated that the defendant had until recently been endeavouring to obtain sufficient evidence within the jurisdiction, and only lately learned from his solicitor that he must positively produce the evidence of the absent parties.

*Mr. Bain* claimed costs if postponement made, urging that the defendant came too late; that replication had been filed on the 12th of January last, and that defendant would require a commission, for which he ought to come promptly after replication filed. The delay since replication filed should be reckoned against the defendant, and if not sufficient to defeat his motion, should be considered in disposing of the costs.

*Patterson v. McNab*, 12 Grant, 484; *Rees v. Attorney General*, [reported in this volume,] were referred to on the question of costs.

THE SECRETARY granted the motion. Costs to be costs in the cause.

**BOULTON V. THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO.**

*Church Society of Toronto—Synod of the Diocese of Toronto—Stayng proceedings on appeal.*

The Church Society of the Diocese of Toronto had become united to and incorporated with the Synod of the Diocese by Act of Parliament. A bond for security for costs of appeal, &c., had been filed, and a motion made to allow such bond, which was objected to on the ground that such bond could not be properly executed without the concurrence of at least one-fourth of the clergy of the diocese, and unless at least one-fourth of the congregations were represented. Held, that the synod was bound by what had been done by the proper officers of the former corporation, without waiting for the action of the Synod, and that there was an implied authority in the act authorizing them to take such a proceeding as that in question on behalf of and in the name of the Synod; and a stay of proceedings, pending the appeal, was granted.

[March 18, 31, 1869].

The Church Society of the Diocese of Toronto was "united to and incorporated with" the Synod of the Diocese by an Act of the Ontario Legislature, passed on the 23rd of January 1869; and the suit of *Boulton v. The Society* has been revived against the new corporation. Notice had been given to the plaintiff on behalf of the new corporation of their intention to appeal to the Privy Council from the order of the Court of Error and Appeal, affirming the order made by this court, overruling the defendant's demurrer to the plaintiff's bill (15 Grant, 450), and a bond by the new corporation and two sureties had been filed, conditioned for the effectual prosecution of the appeal and the payment of any costs and damages which may be awarded, in case the order is affirmed; a motion was made on the 18th of March for the allowance of the security, and the stay of proceedings pending the contemplated appeal.

The motion was objected to on the ground that the bond filed had not been duly executed by the defendants, and was therefore invalid. It was said that by the Act 22 Vic. 139, it was provided that no business should be transacted by the synod of any diocese, unless at least one-fourth of the clergy of the diocese are present, and at least one fourth of the congregations are represented by at least one delegate. It

was sworn to be provided by the canons and constitution of the synod (adopted several years ago), that business to be submitted to the synod must first be submitted to the executive committee two months before the meeting of the synod, and that the committee must make known to the members the business intended to be submitted, at least a month before the meeting of the synod; that no act or resolution of the synod should be valid without the concurrence of the bishop and of the majority both of the clergy and of the laity present and voting at the meeting. It was further stated on affidavit on the part of the plaintiff, that no meeting of the synod had taken place since the act incorporating the church society with the synod was passed; and no resolution of the synod had been passed authorizing the execution of the bond or the appeal to the privy council. These were the facts on which the argument against the motion was based, so far as related to the security. It was also contended that there should not be a stay of proceedings.

*Mr. S. H. Blake*, for the plaintiff.

*Mr. Huson Murray*, for the defendant.

MOWAT, V. C.—I think the argument against the bond demands a wider construction to be placed on the canons and rules referred to than they should receive; and that there must be many matters which the union with the society required to be done without delay, and for which, until the union, the synod had no occasion to provide, and has not provided. In view of this, it is expressly provided by the tenth section of the Act of union that “until other provision is made under this Act by the synod, all the property and funds of the said church society shall continue to be managed by the committee and officers of the said church society, and under the by-laws thereof, but subject to the supervision and control of the synod, to whom all reports respecting the same shall be made.” I think that the defending a suit is clearly a matter incident to the management of the property and funds

of the church; that bringing an appeal from an adverse judgment is likewise incident; and that giving security in the form required by law for the prosecution of an appeal does not stand in a different position. I think any or all of these proceedings may rightfully be taken by the proper officers of the society, without waiting for the action of the synod; that there is an implied authority to take these proceedings on behalf and in the name of the synod, "subject to the supervision and control of the synod." If the synod disapprove of the appeal, it may be discontinued; but without this is done, I think the synod, as a corporate body, is bound by what is done by, the proper officers acting in the name and on the behalf of the corporation.

The motion is also for a stay of proceedings pending the appeal under the act respecting the Court of Error and Appeal (Consol. Stat. U. C. ch. 13, secs. 16, 60, 61); a stay of proceedings does not seem to follow as of course on an appeal from an order overruling a demurrer; but on the English authorities, I think this is a case in which a stay should be granted.

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### POOLE v. POOLE.

#### *Hearing on further directions—Notice of irregularity.*

In a case where fourteen days have elapsed since the confirmation of the Master's report the plaintiff will not be permitted to set down the cause on further directions for a distant day, to the delay of the defendant. Where under such circumstances the cause had been set down on further directions by both parties, a motion by the plaintiff to strike the cause out of the list, the setting down by the defendant being for the earlier day, was refused with costs.

A notice of motion on grounds of irregularity should state the grounds of the alleged irregularity.

[April 21, 1869.]

*Mr. Downey*, for the plaintiff, moved to strike out the cause from the list of causes, to be heard on further directions under the following circumstances:—The plaintiff had had the conduct of the cause, and more than fourteen days had elapsed since the confirmation of the Master's report,

the plaintiff therefore set down the cause to be heard for a day some three weeks distant ; but before notice thereof had been served the defendant set down the cause for an earlier day. To strike the cause out of the list of causes to be heard on this the earlier day was now sought by the present motion.

*Mr. Boyd*, contra. If the plaintiff has grounds for his motion, it must be an irregularity which ought to have been stated in his notice of motion, which it is not.

**THE SECRETARY.**—If you move on the grounds of irregularity, you must state the irregularity in your notice of motion.

*Mr. Downey*.—It is not on the grounds of irregularity that I move ; the setting down is done regularly, that is in form ; but it was improper for the defendant to set down the cause at all, as the plaintiff had already done so.

*Mr. Boyd*.—If the plaintiff's contention is correct, the plaintiff might set down the cause for some day a year or six years hence, and the defendant could not help himself. In the present case the defendant did not know of the step taken by the plaintiff, but had he done so, the present setting down would still be regular. He referred to Consolidated Order 419.

**THE SECRETARY** refused the application with costs.

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McCARROL v. McCARROL.

*Dismissing bill—Security for costs.*

Where security for costs is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be granted *ex parte* on a certificate that no bond for security has been filed.

*Mr. S. H. Blake* moved to dismiss the plaintiff's bill in this cause. An order that the defendant put in security for costs within a limited period had been made some time previous, and no security had been perfected. A certificate of the Registrar that no bond had been filed was produced, and,

**THE SECRETARY** made the order.

IN THE MATTER OF ISAAC F. TOMS AND LEWIS C. MOORE,  
SOLICITORS.

*Solicitor—Summary jurisdiction of Court over.—Negligence.*

The Court of Chancery will exercise a summary jurisdiction over solicitors of that Court and order them to pay over moneys of clients in their hands. Where, therefore, it was shewn that a client had paid his solicitor \$1800 to be applied in carrying out an agreement to purchase entered into by him, and which they informed him they had paid into court, but had not done so, they were ordered to pay the amount in ten days. It being shewn, also, that a bill for specific performance instituted by them as his solicitor to enforce the said agreement had been dismissed with costs for want of prosecution, owing to the default of said solicitors; the costs so paid were not included in the above mentioned order, but the client was left to his action at law. So also with respect to money paid to the vendor and lost by the negligence of said solicitors, and money paid to them on account of their own costs.

*Mr. Mulock* moved on the part of William Thompson for the payment to him of certain moneys alleged to be in their hands belonging to him.

The petition of the said William Thompson set forth:— “That the said Isaac F. Toms was, on the first day of September, 1867 and has ever since that time, and still is a practising solicitor of this Court, practising in the town of Goderich; that the said Lewis C. Moore was on the first day of September, 1867, and has been since that time, and still is a practising solicitor of this Court, practising in Goderich; that the said Isaac F. Toms and Lewis C. Moore were on the said first day of September, 1867, and ever since that time, and now are practising as solicitors in said county, in co-partnership in said town of Goderich, under the name, style and firm of “Toms and Moore”; that the petitioner in the month of June, 1867, entered into an agreement with one Forsyth for the purchase from the said Forsyth of certain lands; that on the third day of October, 1867, the petitioner employed the said Toms and Moore to act as your petitioner's solicitors in the matter of said purchase, and the said Toms and Moore agreed so to act; and petitioner therefore on said third of October, 1867, deposited the sum of \$1800 being part of the purchase money for said lands, with the said

Toms and Moore, to pay the said sum of eighteen hundred dollars to the said Forsyth upon the said Forsyth completing his part of the said agreement ; and the said Toms and Moore received the said sum of \$1800 on the terms of the said instructions ; that a short time after the said third of October, petitioner received a letter from the said Forsyth refusing to carry out said agreement, and petitioner then attended on said Toms and Moore and was advised by them petitioner could enforce specific performance of said agreement, and petitioner relying on such advice then instructed said Toms and Moore to take the necessary legal proceedings to enforce such specific performance ; that the said Toms and Moore from time to time have written to and otherwise communicated with petitioner and informed petitioner that they had instituted a suit in the said Court of Chancery against the said Forsyth for specific performance of said agreement, and that they had paid the said sum of \$1800, with interest, into Court in the said suit ; In the month of May, 1868, the Deputy Sheriff of the united counties of Northumberland and Durham attended at your petitioner's residence with an execution in favour of said Forsyth against petitioner's goods and chattels, and petitioner then for the first time ascertained as the fact was that the bill filed in the said suit had been dismissed with costs to be paid by petitioner, which costs, including Sheriff's fees, amounted to \$97, and to pay which costs said execution was issued, and your petitioner was obliged to pay the said sum of \$97 ; petitioner then caused the said Toms and Moore to be communicated with on the subject of the said suit, and was informed by them that the solicitor for the said Forsyth had taken advantage of the unavoidable absence of the said Toms at the time the said suit had come on for hearing and examination of witnesses, and caused said bill to be dismissed, and admitted the said suit was so dismissed through their negligence and promised to refund to petitioner the said sum of \$97, but they have never done so ; the said sum was not dismissed for the causes aforesaid but because the said sum of \$1800 had not been paid into Court ; petitioner paid \$200 to said Forsyth on account of said purchase, which sum has

been lost to him through the negligence of the said Toms and Moore ; petitioner had been put to great trouble and expense, through the negligence of said Toms and Moore, and has been thereby obliged to expend the sum of one hundred dollars and upwards ; petitioner paid the said Toms and Moore ten dollars on account of their costs in the matter and suit aforesaid, and also five dollars for certain travelling expenses of said Forsyth in connection with said purchase, but which sum of five dollars had not been paid said Forsyth ; no portion of said sums of money had been repaid to petitioner or any person for him, but said Toms and Moore have retained and applied the same to their own use, and refuse to pay the same or any portion to the petitioner, and petitioner felt that he might lose the said sum unless repaid forthwith ; and prayed that said Toms and Moore might be required fully to account to petitioner in respect of the said sums of \$1800, \$97, \$200, \$100, \$10 and \$5 and interest thereon, and might be required forthwith to repay the same to petitioner, together with costs of the present application."

The petition was verified by the affidavit of the petitioner, and a certificate of the Registrar shewed that no money had been paid into Court in the cause of *Thompson v. Forsyth. Re Carroll*, reported in this volume, was referred to.

THE SECRETARY.—The petitioner seeks an order for repayment by solicitors of a sum of \$1800 which he entrusted to them for the purpose of paying over to a man from whom he had purchased property.

It appears that the vendor refused to carry out the agreement, and the plaintiffs filed a bill for specific performance, stating to the petitioner that they had paid the \$1800 into Court.

This it is clearly proved they did not do, and no one appears for them on this application, to give any explanation of their conduct in retaining the money, though the petition expressly charges them with having applied it to their own use.

The suit for specific performance was dismissed for want of prosecution, and as it would appear from letters written by the solicitors to the petitioner, the dismissal was owing to their negligence.

The petitioner had to pay \$97 defendant's costs in that suit, and he seeks an order for repayment by the solicitors of that sum, and also of \$200 which he had paid to the person from whom he purchased the property, and which he has lost through the negligence of the solicitors. He also alleges that he has been put to an expense of over \$100 by the conduct of the solicitors, and he asks that they may be made to pay that sum also, and to repay him \$10 paid to them on account of costs.

The petitioner is clearly entitled to an order for the repayment by the solicitors of the \$1800 (*Ex parte Burdon*, 18 Jur. 742; *Ex parte Becke*; 18 Beav. 462; *Re Cullen*, 27 Beav. 51), but I fear that as to the other claims I have no jurisdiction to make any order against them. (*Frankland v. Lucas*, 4 Sim. 586).

The only remedy the petitioner seems to have for these is by an action at law (1 *Smith's Pr.* 171).

Unless some authority for my exercising the jurisdiction is shewn, the order now to be made must be limited to the \$1800.

The order will therefore go for paying the money into Court within ten days, (*Re Cullen*, 27 Beav. 51), and for the costs of the application.

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## JACKSON v. GARDINER.

*Practice—Appeal from Chambers—Time for.*

A motion by way of appeal from an order made in Chambers, must be made within the fourteen days limited by the Consolidated Orders, unless an order for further time has been obtained. Without leave, it is not sufficient that the notice of motion be given within the fourteen days.

This was an appeal from an order made on an application argued before the Secretary in Chambers.

Two points were discussed. The first was, as to the day from which the fourteen days allowed for the appeal motion should count: the second question was, whether it was sufficient that notice should be given within the fourteen days, or whether the motion must be actually made within the fourteen days.

*Mr. S. H. Blake*, for the respondents, referred to *re Miller*, 12 Grant, 72.

*Mr. Bain*, contra, argued that had the office of the Secretary been kept closed during the Christmas vacation, the order would have borne date the 6th of January; that no notice had been given him of judgment having been pronounced, and that the time should only count from the end of vacation; and he relied also on the analogy of the practice in the case of appeals from the Master. Consolidated Orders Nos. 253, 324, 329, 392, and 408, were referred to.

*Mowat*, V. C. (after conferring with *Spragge*, V. C.), held that such a motion must be made within the fourteen days, unless leave is obtained to move subsequently; and it being admitted that in that case the appeal was too late, whichever day the fourteen days should be reckoned from, the motion was dismissed with costs.

**RHES v. ATTORNEY GENERAL.***Costs—Postponing hearing, &c.*

It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, costs in the cause.

The engagements of a witness who was a Senator of the Dominion and a member of the Executive Council, at his duties at Ottawa, where the Senate was in session, were deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing.

*Mr. Cooper*, on the part of the Corporation of the City of Toronto, who were defendants, moved to postpone the examination and hearing of a cause, under the following circumstances :—

The cause was brought against the Grand Trunk Railway Company of Canada, the Corporation of the City of Toronto, and the Attorney General, the latter of whom, however, had been held on demurrer, not to be a necessary party, the Crown having no longer any substantial interest in the property in question. Replication had been filed, and the cause set down for hearing. The solicitor for defendants, the Corporation of Toronto, had subpoenaed the Honorable Mr. Campbell, who had been Commissioner of Crown Lands at the time of the granting of the patent sought to be aside, and who was now Postmaster General of the Dominion of Canada, and, it was sworn, was a necessary and material witness for the defendants, and also Mr. Hewitt Bernard of the office of the Minister of Justice, and had paid their conduct money. He had received telegraphic messages, stating that "it was impossible for Mr. Campbell to leave Ottawa whilst the Senate was in session."

*Mr. S. H. Blake*, for the defendants, the Grand Trunk Railway Company, had no objection to such order as the other defendants might be deemed entitled to. The Corporation of Toronto were the real defendants, and he did not desire to interfere with their position.

*Mr. E. W. Hurd*, for the plaintiff, opposed the motion, and argued, that if granted, it could only be upon payment of costs.

THE SECRETARY considered that the costs should properly be costs in the cause, and granted the order asked on those terms.

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#### LINDSAY PETROLEUM COMPANY V. HURD.

*Motion made by leave of Judge.*

It is no objection to a motion made by leave of a Judge that the name of the Judge granting leave is not given in the notice of motion.

[February 16, 1869.]

*Mr. Graham* moved on notice and by leave to stay proceedings pending re-hearing.

*Mr. Smart*, contra, objected that the notice did not give the name of the Judge by whom the leave was granted.

THE SECRETARY over-ruled the objection.

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#### McGREGOR V. MAUD.

*Amending bill without prejudice to Injunction.*

A motion to amend without prejudice to an injunction will not be granted *ex parte*.

If the amendments are such as could be made without a special application the order can be obtained on *præcipe*; if not, notice must be given to the parties affected by the amendments.

[February 19, 1869.]

*Mr. Lash* moved, *ex parte*, for an order to amend without prejudice to an injunction. The injunction had been continued to the hearing upon motion to that effect. The bill had not been amended before, and the proposed amendments were such as it was admitted materially altered the case.

THE SECRETARY.—In *Attorney-General v. Clendinning*, V. C. Spragge decided that the order to amend might have been taken, *ex parte*, and he allowed only

such costs. The rule he appears to lay down is, that where the amendments are such as could be made without a special application, the order should be taken out on *præcipe*; if not, then that it would be proper to come to Chambers. I must therefore refuse this motion. If the amendments are such as would affect the other party, the application can only be made on notice; if not, then the order can be obtained on *præcipe*.

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#### ROYAL CANADIAN BANK v. CUMMER.

##### *Issuing commission.*

A commission cannot regularly be issued until after replication filed.

[March 4, 1869.]

*Mr. McMurrich* moved for a commission to examine F. D. Cameron, at Cedar Springs, Michigan.

*Mr Bain*, contra, objected that the application was made too soon as no replication had yet been filed.

THE SECRETARY considered that no commission could issue till replication filed.

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#### IN RE THE BAPTIST CHURCH PROPERTY OF STRATFORD.

##### *Act 24, Vic. ch. 48—Church property.*

A deed to come within the Statute 24 Vic. ch. 48, must have been registered within a year after the passing of it. The advertisement required by the Act should specify the terms of sale. A deed of church property ought to shew how the successors to the trustees named are to be appointed.

[March 27, 1869.]

*Mr. J. A. Boyd*, moved on behalf of trustees, the successors of those named in the original deed, *ex parte* to confirm the sale of certain property belonging to the Baptist Church of Stratford, and no longer required by that body for church purposes.

The deed to the trustees had not been registered within a year from its date. An act had been passed, 24 Vic. ch. 43, extending the time for registering, and giving a year from the passing of the act. The deed in this case, however, had not been registered until more than a year after the passing of the act, and the question now for consideration was, whether the deed was properly registered and valid.

**THE SECRETARY.**—The deed is not properly registered. The statute cited does not comprise deeds registered at any time after the passing of the act, it only makes good deeds registered under it, and there has been no such registration here. There are, however, other objections. The advertisement does not specify the terms of sale, and this is necessary : see Con. Stat. ch. 69, sec. 8, and *Re Congregational Church, Toronto*, 1 Cham. Rep. 349. Then the deed does not shew how the successors to the trustees named in it are to be appointed. This would appear necessary.

*Application refused.*

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#### CHADWICK v. THOMPSON.

*Producing papers in charge of Deputy Registrar at trial at Nisi Prius.*

The Deputy Registrar will be ordered to attend at a trial with papers in his custody. But to obtain such an order it should be shewn that the papers required are the original documents, and that the production of office copies will not be sufficient.

[April 21, 1869.]

*Mr. Evans* moved, *ex parte*, for an order that the Deputy Registrar at Woodstock attend an Assize Court, with the original papers in this suit. He produced no affidavit, but stated the receipt of a telegram saying the papers were required. He relied on the practice in similar cases in the common law courts.

**THE SECRETARY** said he could not make the order unless it was shewn that office copies of the papers would not do instead of the originals : Taylor's Orders, 126, 360.

## RE NEWMAN.

*Lunatics—Service*

On an application to declare a person a lunatic without commission, an affidavit by an officer of a lunatic asylum that the alleged lunatic is in such a state of mind as that service on him would be dangerous and prejudicial to him, will not be held sufficient to dispense with personal service on him.

Where, however, such affidavit was corroborated by others, and it was evident the party was a dangerous lunatic, personal service on him was dispensed with.

**THE SECRETARY.**—This is an application under sec. 33 of the Con. Stat. U. C., cap. 12, to declare John Newman a lunatic without the issuing of a commission. He is at present an inmate of the Rockwood Lunatic Asylum, and a copy of the petition has been served upon the medical superintendent, but not upon the alleged lunatic himself. I am asked on the authority of *Re Paton*, 1 Cham. Rep. 192, to dispense with personal service on the lunatic, the superintendent having made an affidavit that such service would be dangerous and prejudicial to him.

I do not think the mere fact of such an affidavit being made by the medical superintendent of an asylum in which the alleged lunatic is confined would be sufficient to justify the court in dispensing with personal service.

The confinement of the person in the asylum might be wholly unjustifiable, and the refusal to permit service upon him might be to prevent his case being brought under the notice of the court, and his being set at liberty.

Personal service, or indeed any notice of the execution of a commission of lunacy to the alleged lunatic does not, however, seem absolutely necessary : Shelford 100, 101.

In the present case, where the evidence of insanity is very strong, and where an affidavit of the alleged lunatic being not merely insane, but a dangerous lunatic, is made by the family physician, and where the police magistrate of the city swears he had to commit the person to custody as a dangerous lunatic, I think personal service may safely be dispensed with. The affidavit by the medical superintendent is in this case corroborated by the affidavits of these two disinterested witnesses.

**CHARD V. MEYERS.***Changing venue.*

When it is shewn that the convenience of witnesses would be better served by a change of venue, such change will be made without costs.

[April 27, 1869.]

*Mr. J. A. Boyd*, who also represented the plaintiff, moved on behalf of one of the defendants, to change the venue from Toronto to Belleville. It was alleged that the witnesses could attend at Belleville with much greater convenience than at Toronto.

*Mr. Mc Williams*, contra, on behalf of another defendant, opposed the motion. The plaintiff had a right to choose the venue. One of the defendant's witnesses resided at Orillia, and if any change was made it should only be done on payment of costs.

THE SECRETARY considered that the convenience of the witnesses was the chief consideration, and made the order without costs.

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**MCKENZIE V. WIGGINS.***Order for possession.*

On moving for an order for delivery of possession it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause.

*Mr. Hamilton* moved for an order for delivery of possession. It appeared that the party in possession was not a party to the suit.

THE SECRETARY refused the application, saying such an order could only be made against a defendant.

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## RE ISRAEL.

*Administration suit.*

In moving for an administration order, the letters of administration should be produced.

[April 28, 1869.]

*Mr. Wm. Fitzgerald* moved for an order for the administration of the estate of the late Carl Israel. The administration had been entered upon by one John Beck, the son-in-law of deceased, but it was now considered desirable to have the estate administered under the direction of the court.

*Mr. Bruce*, for Beck, the acting administrator, objected that no letters of administration were produced, and urged that the motion should be dismissed with costs.

THE SECRETARY, on the authority of *Fowler v. Marshall*, 1 Ch. Cham. R. 29, dismissed the motion with costs.

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## WALLACE v. ACRE.—LIVINGSTON v. ACRE.

*Attachment—Orders 288 and 298—Direction to do an act “forthwith”—Attorney.*

A direction to do an act “forthwith” is a sufficient compliance with Orders 288 and 298.

Where under an order so endorsed a party was attached for disobedience, the attachment was held to be regular, and the parties only entitled to their discharge on compliance with it.

Where the attorney of the parties directed to confess judgment at law, had been arrested for disobedience of the order, as well as the parties themselves, his arrest was held to be irregular and his discharge ordered.

This was a motion to set aside an attachment under which the plaintiffs in these suits and their attorney, Mr. Norris, had been arrested, and to rehear the order made therefor.

It appeared that some two years previous the plaintiffs had obtained an injunction to restrain proceedings at law in an action of ejectment in which they were defendants. The order granting the injunction directed that it should issue

upon the defendants in the said action withdrawing their defence at law and allowing judgment to be signed against them. The bill in the injunction suit had subsequently been dismissed with costs. The defence to the action at law was not withdrawn, and after two years the defendants took out an order for attachment on *præcipe*.

*Mr. Wells*, for the plaintiff, contended : first, that such a suit could not issue on *præcipe*. 2nd. That no time had been limited for the performance of the act required by the order, which ought to have been done, that although orders *nisi* were now done away with, notice had been substituted and that the present practice did not warrant the issuing of an attachment in the first instance for the disobedience of an Order, he referred to the former Order, No. 46, and the present Consolidated Orders 288 and 293. In the present case there had been no notice to the parties concerned of the power or intention to arrest. As to the direction to perform the required act "forthwith": *Morphy v. Feehan*, 2 Cham. Rep. 53 ; *Gray v. Hatch*, 2 Cham. Rep. 12 ; Braithwaite's Records and Writs Pr., were referred to.

*Mr. Boyd*, for defendant, at whose instance the writ issued, contended that the term "forthwith" was sufficient under the General Orders, and cited *Shaw v. Nokes*, 6 Law Rep. Equity, 521, as an authority; and *Re Turner*, before the Secretary, where the practice contended for had been adopted. The order is properly endorsed according to the General Orders, and is absolute in the first instance.

*Mr. Hodgins*, for Norris, the attorney, referred to *Morgan*, 472 ; *Ex parte Clarke*, 1 R. & M. 563.

**SPRAGGE, V. C.**—I hold the order as against the parties Wallace and Livingstone to be regular. *Shaw v. Nokes*, is an authority that a direction to do an act "forthwith" is a compliance with the order. The parties may be discharged upon giving a warrant of attorney to be placed in the hands of the Registrar, and doing any other acts that may be necessary to enable the plaintiff to have judgment at law against

them. The plaintiff may have leave to re-hear the order of March last, upon giving security to account for rents and profits. Each plaintiff may have stay of proceedings on the judgment at law until re-hearing of order of March, 1869. The defendant is entitled *prima facie* to the costs of the application. He will recover them unless the court think fit to direct otherwise upon the matter disclosed in affidavit. As to the order against the attorney-at-law and his commitment, the attachment for his commitment ought not to have issued, and the order ought to have gone only against the party, not the attorney-at-law. He is to be discharged upon undertaking not to bring any action at law, but without prejudice to any application he may make to the court.

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#### CAHUAC v. DURIE.

##### *Enlargement of time for payment of mortgage money.*

The court will exercise a discretion in granting an enlargement of time for payment of mortgage money, and where a reasonable case is made out will extend the time on such terms as are considered just. Where therefore, delay was shewn on the mortgagor's part, but he shewed a reasonable prospect of being able to pay in a few months, the principal and interest were directed to be capitalized and interest on the whole paid, and the costs of the application to be paid in a week.

*Mr. Hector*, for the defendant, moved for an order to extend the time for the payment of the amount found due to the plaintiff in this cause. He shewed by affidavits that the property, a farm in Vaughan, was likely to become much more valuable in a few months, by the tide of emigration and the construction of certain contemplated railroads. He contended that on a first application it was usual to give six months' enlargement almost as a matter of course. He referred to *Thornhill v. Manning*, 1 Sim. N. S. 451; *Gould v. Vankoughnet*, 2 Chan. Cham. Rep. 33; *Cameron v. Cameron*, reported in this volume; *Platt v. Ashbridge*, 12 Grant, 105. He pointed out that the plaintiff was in receipt of the rents and profits of the premises, and urged that the court would not give effect to a forfeiture where it could be reasonably

avoided. The arrears of interest were large, amounting to some \$1500, and defendant was not prepared to pay them in full, but he would pay \$250 on the 10th of July ensuing.

*Mr. Hamilton*, contra, urged that the money due was for purchase money of the premises, which had been bought he alleged on speculation. The defendant had never paid any part of the purchase money out of his own pocket, what had been paid, had been paid from the proceeds of sales of part of the premises which plaintiff had released. The defendant had already had eighteen months time to pay in. The over due interest was \$1500, which was itself bearing no interest, and the principal bore only 6 per cent. Such enlargements were never granted, he contended, without payment of all arrears of interest and costs: See *Fisher* on Mortgages. If granted without such payment, then he contended the principal and interest should be capitalized, and interest charged on the whole sum. He referred to *Whitfield v. Roberts*, 7 Jurist, N. S. 1268, and *Cameron v. Cameron*, reported in this volume, where a similar condition was made.

*Mr. J. Hoskin*, for another defendant, consented to the order as asked.

THE SECRETARY granted the order, directing the defendant to pay \$250 on account on the 1st of July, and to pay the costs of the application in a week, and that the total sum now due for principal and interest, be treated as principal, and bear interest at the rate agreed on in the mortgage as to principal; and that the whole amount be paid on 1st November, otherwise foreclosure.

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#### ERLE V. HUNT.

*Service out of the jurisdiction.*

A written admission of service, and that the party making it was the defendant in the bill, made by a defendant served in Montreal was received as sufficient proof of service on an affidavit being filed of a party within the jurisdiction proving the handwriting.

*Mr. Lash* moved to have the service of the bill in the

cause allowed under the following circumstances :—The defendant had been served in Montreal, and gave an admission of service in writing, admitting that he was the defendant named in the bill; an affidavit of a person within the jurisdiction proved the handwriting of the admission to be that of the defendant.

THE SECRETARY made the order allowing the service.

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#### COTTLER v. VANSITTART.

*Order to produce.*

An order to produce cannot regularly be taken out after decree. An order so taken out on *præcipe* was on motion set aside with costs.

An order to produce was issued on *præcipe* by the Deputy Registrar, at Whitby, upon the application of the defendant. The decree had been made in 1867, and a report and final order for sale had followed in due course.

*Mr. A. C. Chadwick*, on behalf of the plaintiff, moved against the order, and contended that an order to produce could not be had after decree. Production in obedience to the order was substituted for the old practice of interrogatories, and therefore could no more be asked for now than the defendant could be called upon to answer interrogatories after decree. Production is required merely for the purpose of evidence, and as after decree there is nothing to be tried, evidence is useless, and the order therefore puts the plaintiffs to unnecessary expense. Some English cases would seem to support the right to an order to produce at the present stage of the cause, but the English practice is different from ours, and the common order to produce seems to be properly used there for the purposes of the Master's office, but here other machinery is provided. He referred to *Daniell*, Pr., pages 572, 1899.

*Mr. Smart*, in support of the order, read an affidavit shewing that there were lands remaining unsold: that the plaintiffs had some time ago proposed to sell these without shewing title. The defendant, who is a mortgagor, has an interest in the amount to be realized by the sale, and has taken his order to obtain the production of the deeds: *Taylor's Orders*, 190, and *Rippon v. Dolman*, 2 W. R. 432, were referred to.

THE SECRETARY set aside the order with costs.

Box v. PROVINCIAL INSURANCE COMPANY.

*Time for appealing.*

The court will extend the time for appealing to the Court of Error and Appeal, upon the party appealing shewing reasonable cause for the delay that has taken place.

[May 5, 1869.]

*Mr. Parkinson* moved, on the part of the plaintiff, for leave to appeal from the decree in this cause to the Court of Error and Appeal, although the year limited by the order from the hearing of the cause had expired. It was shewn that judgment had been given on the original hearing of the cause in May, 1868; that the cause had been reheard in December, 1868, and judgment on rehearing given in April, 1869, affirming the original decree, which had dismissed the bill with costs; and *Mr. Parkinson* claimed that he came as promptly as possible to carry his cause to appeal, he cited *McFarlane v. Dickson*, 2 Chan. Cham. Rep. 277; *B. U. C. v. Wallace* 2 Chan. Cham. Rep. 169.

*Mr. Meyers*, contra, urged the delay that had taken place and that the orders to be serviceable should be adhered to.

THE SECRETARY considered the application reasonable and granted the order, putting the plaintiff upon terms to set the case down for the next sittings of the Court of Error and Appeal.

## HODGSON V. PAXTON.

*Restoring bill after dismissal.*

*Sensible*.—A bill properly dismissed for want of prosecution will only be restored under strong and special circumstances. Where an injunction bill had been dismissed which had been filed to restrain proceedings at law, and judgment at law had been confessed on obtaining the injunction, and afterwards on the dismissal of the bill, money paid under the pressure of the judgment which it was now alleged was in excess of any due. A motion to restore the bill and take accounts between the parties was refused.

[May 6, 1869.]

*Mr. J. Hoskin* moved to restore the bill in the cause which had been dismissed to the files. The bill had been filed to restrain an action at law brought on a bond, and for an account of what was due on the bond. An injunction had been obtained on the plaintiff's confessing judgment. The bill was subsequently dismissed, and the present plaintiff, the defendant-at-law, under pressure of a threatened execution paid the amount sued for, which it was alleged was in excess of what he owed. The order to dismiss had been granted in January last. He referred to *Davy v. Davy*, 2 Cham. Rep. 26, and *Daniell's Pr.*, as authority for restoring a bill, and asked that the plaintiff be enabled to have the cause heard on bill and answer, with a view of taking an account of what had been paid defendant, and that any excess might be repaid.

*Mr. S. H. Blake*, contra. The motion in effect asks for a decree, substantially as prayed for, in the bill already dismissed : *Davy v. Davy* is authority for refusing such a motion after so long a delay as had taken place here—if the plaintiff has merits, as he asserts, his course is to file a new bill—every thing now urged was, or could have been, heard against the motion to dismiss.

**THE SECRETARY.**—I think I should refuse the application leaving the parties to take any proceedings by an independent suit or otherwise, to recover back the money improperly paid, if any.

## McEWEN v. BOULTON.

*Affidavit, sufficiency of—Means of knowledge of deponent—Made by agent—The expression “owner in fee.”*

An affidavit made by the plaintiff's agent, stating that he had the management of all the plaintiff's business in this country, was held as sufficiently shewing his source of information.

The expression “owner in fee” held to mean the beneficial owner.

[May 7, 1869.]

*Mr. Crickmore* moved, on notice to set aside an order for security for costs, on the grounds that the plaintiff had property within the jurisdiction of the court. He referred to *Gault v. Spencer*, 2 Cham. Rep. 92.

*Mr. Smart*, contra, objected that the affidavit read in support of the motion was made by the plaintiff's agent instead of by the plaintiff. In *Gault v. Spencer* and similar cases the affidavits were always made by the principal. The agent's affidavit, if admissible at all, should shew fully his source of knowledge of the facts he alleges. It was also suggested that the affidavit only stated that plaintiff owned “lands in fee.” They might, for anything that appeared, be burdened with all sorts of trusts.

*Mr. Crickmore* in reply.—The deponent swears distinctly he was the agent in Canada of the plaintiff, and manages all his business, which itself shews sufficient grounds of knowledge. The bill is filed to foreclose a mortgage on which the plaintiff claims a balance. The defendant does not in his affidavit deny a balance due, and that alone ought to be sufficient security for costs.

**THE SECRETARY.**—I think the affidavit sufficient as far as form goes. It is made by the plaintiff's agent, and his statement that he has the management of all the plaintiff's business in this country, is, I think, a sufficient indication of his source of knowledge as to the plaintiff's ownership of the property referred to.

I think I should hold the expression “that the plaintiff is

owner in fee simple" to mean that he is the absolute and beneficial owner. Mr. Smart should, however, have an opportunity of enquiring as to this property.

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### McDONELL v. U. C. MINING COMPANY.

*First steps taken by a new solicitor—Endorsing papers—Abatement of suit where plaintiff assigns his interest.*

Where the plaintiff's solicitor had been changed, and an order for such change served upon the defendant's solicitor, who had acted under such change by serving the new solicitor with notice of filing bond for security for costs of appeals; an objection that a proceeding subsequently taken was not endorsed with the name and place of business of the new solicitor was over-ruled.

Where a plaintiff had assigned in part his interest in the subject-matter of the suit, an objection that the suit had abated was over-ruled.

[May 7, 1869.]

*Mr Scott moved to disallow the bond for security of costs in appeal.*

*Mr. Moss, contra, took two preliminary objections:—*

*First—That this being the first step taken in the cause by the present solicitor, the papers should have been endorsed with his name and place of abode, which they were not.*

*Second—That the proceedings were irregular in their present shape, the suit having abated, it being shewn on the plaintiff's own examination that he had assigned his interest in the subject-matter of the suit.*

The motion stood over until these preliminary objections were disposed of, and on the next day the following decision was delivered by

**THE SECRETARY.**—Two preliminary objections were taken by the solicitor for the defendants, and I adjourned the main motion till I could consider and dispose of these.

The first objection was, that the notice of motion served though the first step taken in this cause by the present solicitor for the defendant, is not endorsed with the name and place of business of the solicitor giving it as required by General Order, 41.

It appears that an order changing the solicitor was taken out, and a copy served on the defendant's solicitor. This order was in fact the first step taken by the present solicitor and the copy of this order served either had his name and place of business endorsed on it, or it had not.

If it had, the present objection cannot prevail, as this notice of motion is not the first proceeding taken by the solicitor, and if it had not, I think the defendant's solicitors have precluded themselves from now objecting by having treated this service on him of the order unendorsed as good and sufficient, for they afterwards served upon the solicitor a notice of filing the bond, addressed to him as plaintiff's solicitor.

The only object in requiring the endorsement of the name and place of business is, that the party served may know who is the solicitor acting against him, and where to effect service of any papers he may desire to serve.

The second objection was that the suit has abated by the plaintiff having assigned his interest in the subject matter of this suit, and in the moneys payable under the decree.

In the affidavit filed on the part of the defendants, it is alleged that Alexander McDonell on being examined in the Master's office "stated that he had obtained from the plaintiff an assignment in part of the subject matter of the suit." It is admitted by the plaintiff's solicitors that the plaintiff had assigned his interest, but only by way of security.

I think that such an assignment does not, as in the case of an absolute assignment of the whole, preclude the plaintiff from continuing his suit (Pemberton, 50); and though Mr. Pemberton says that if he does so he must make the assignee a party, yet in *Daniell's Practice* (2 Dan. Pr. 1393) it is expressly said that it is not necessary to bring the assignee before the court.

I therefore overrule the objections.

## GIBB v. GIBB.

*Alimony suit—Costs—Act 32 Vic. ch. 18, Ont.*

On a question arising under the above Act and the General Order 491, it was held that the plaintiff in an alimony suit is not entitled to the \$40 mentioned in the order.

[May 11, 1869.]

*Mr. Ferguson*, for the plaintiff, submitted for decision the question raised in the following special case which had been agreed on between the parties.

"This was an alimony suit and was commenced on the fourteenth day of December last, the interim alimony was fixed by consent to commence from the filing of the bill, and on the nineteenth day of the same month, the defendant paid the first month's interim alimony, and twenty-five dollars costs, being the twenty dollars mentioned in order No. 491 of the Consolidated General Orders, and five dollars for mileage on serving the bill, and the interim alimony has since been regularly paid.

"Upon this state of facts the question submitted is whether or not the plaintiff is entitled, on setting down this cause after passing of 32 Vic. ch. 18, Ont., to the forty dollars mentioned in said Order No. 491."

*Mr. Ferguson*, for the plaintiff, contended that the act did not apply in the present case, as the interm alimony had already been fixed by consent. That as the cause had been commenced previous to the passing of the act the plaintiffs right to costs had accrued before the act, and the court would not abridge such rights unless the express words of the act imperatively obliged them to do so; the right to costs was a vested right as much as any other subject matter: see the language of Chief Baron Pollock in *Wright v. Hale*, 6 H. & N. N. S. 230; see also *McDonald v. McDonald*, 14 Grant, 135, and the authorities there cited; also, *Bank of Montreal v. Scott*, 17 U. C. C. P. 358.

*Mr. Rae*, for the defendant, relied on the second section of the act (32 Vic. ch. 18), which provides that a plaintiff, who

obtains an alimony decree can only recover disbursements, and contended that before she could recover more she must have succeeded in establishing her claim to relief. To construe the order 491, so as to compel the defendant to pay the forty dollars, would in effect be rendering the act nugatory. The act in effect abrogated the order.

THE SECRETARY.—I think the plaintiff is not entitled to the forty dollars.

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#### WRIGHT v. WESTERN INSURANCE COMPANY.

##### *Production of documents.*

A party called on to produce documents must state distinctly in his affidavit on production what are the documents he seeks to protect, and the grounds on which he claims them to be privileged.

[May 12, 1869.]

*Mr. S. H. Blake* moved for an order for a better and further affidavit on production, and that certain deeds referred to be produced.

The affidavit on production filed admitted that there were other documents than those produced, but claimed that these were confidential and privileged from production, without stating the nature or particulars of them, or on what grounds they were so privileged.

It appeared on the argument that the documents were reports from the agents of the Insurance Company who had taken the risk, and the Inspector who had visited the premises. Mr. Blake contended that there could be no question that they were bound to produce such documents. They did not stand on the same footing as communications between the client and his solicitor. He referred to *Seton* on Decrees 1055 & 1060; *Wigram* on Discovery; and to *Wiman v. Bradstreet*, 2 Chan. Cham. Rep. 77; *Commercial Bank v. G. W. R.*, 25 U. C. Q. B. 335.

*Mr. Sampson*, contra, urged the danger and inconvenience

to public companies like the plaintiffs not being able to protect from production the confidential reports of their own agents.

THE SECRETARY.—I think the defendants are bound to produce the documents, and I order them to file a further and better affidavit and to produce the documents.

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#### MALLORY v. MALLORY.

##### *Changing venue.*

The venue in a cause should be selected with a due regard to the convenience of the suitors and of the witnesses. And if the venue laid in the bill is not so selected, an order to change it will be made.

The circumstance of the Master at the town to which the venue was sought to be changed having been at one time concerned as an arbitrator between the parties to the cause, was held no sufficient reason for not taking the suit before a Judge there.

[May 12, 1869].

Mr. S. H. Blake moved on behalf of the defendant, C. R. Mallory, to change the venue in the cause from Belleville to Cobourg.

The affidavits filed in support of the motion shewed that all the witnesses for the defendant now moving, numbering about seventeen, lived in or near Cobourg; that the solicitors for both parties also lived there. That it was believed that the plaintiff's witnesses also lived in the same neighbourhood, and no one connected with the cause lived at or near Belleville, and it was urged that to continue the venue at Belleville would entail about \$200 additional costs.

Mr. Macdonald, for the defendant, Louisa A. Kelly, opposed the motion. On his part it was alleged that the bill was filed to set aside a conveyance to defendant, C.R. Mallory, on the ground of fraud, and a reference had formerly been made to Mr. Weller, the Master, at Cobourg, and it was objectionable to now send the matter before him. Mr. Weller might be called on as a witness. As to the extra expense, the defendant, Louisa Kelly, is willing to bear that, and he

contended that the rule was the same here as at law, where in transitory actions the plaintiff was held to be *dominus litis* and had the right to select his own venue; see *Taylor's Orders*, page 252; *Moor v. Boyd*, Law Journal (1865), p. 184. There must be, he urged, an obvious preponderance of convenience in favor of the place to which it was sought to change, and here there was no such preponderance.

*Mr. J. Hoskin*, for the plaintiff, took the same grounds as taken by the counsel for defendant, Kelly, and referred to *Diamond v. Gray*, 5 Law Journal, N. S. 95; as to the extra expense, he offered to pay into court a sufficient sum to cover that.

*Mr. Blake*, in reply, urged the loss of time and inconvenience to witnesses, at this season of the year especially, by being taken from their farms to Cobourg, and referred to *Ledyard v. McLean*, 10 Grant, 139.

THE SECRETARY.—I think, if in any case the venue should be changed, it should be changed in this. The property is near Cobourg, the parties live there, so do their solicitors, and all the witnesses live in Cobourg or the neighbourhood. It is true the solicitors for the plaintiff and the defendant, Mrs. Kelly, offer that these parties should pay the extra expense of the examination at Belleville, but I do not think I should on this ground refuse to change the venue. No reason for retaining it at Belleville is given. The parties should not be put to the expense simply because for some unassigned reason the solicitors wish the cause tried at Belleville, nor should the witnesses, especially at this season of the year, be liable to a detention from their homes unnecessarily. From the affidavits it would appear that any connection the Master at Cobourg had with the case was as an arbitrator between the parties; so far from this being a reason for not taking the suit before a Judge at Cobourg, it would almost seem a reason for directing the reference there.

## MOORE v. ROSEBURGH.

*Dismissing bill.*

If a bill is filed and no office copy served within the period limited for service (three months), the bill will on application be dismissed. It is no answer to a motion to dismiss under such circumstances that the bill was filed previous to 1864, when the order limiting the time was passed.

[May 26, 1869.]

*Mr. Downey* moved to dismiss the bill in the cause, no office copy having been served within the time limited by the order. The bill had been filed in 1864, and a *lis pendens* registered, since which time nothing had been done.

*Mr. Edgar*, contra. The motion is to dismiss for want of service, not for want of prosecution. The order relating to service, by which time is limited, was not passed in 1864, when this bill was filed, and consequently cannot apply to it. The delay in the suit was in consequence of negotiations for a settlement.

*Mr. Downey*, in reply. The principle of dismissing a bill under such circumstances is fully sustained by the practice. The Chancellor acknowledged it in *Sims v. Denison*; and *Somerville v. Kerr*, 2 Cham. Rep. 154, is also in point. The negotiations were not such as created delay, as far as the present defendant moving was concerned; and he read affidavits explaining that the applications and discussions referred to in the plaintiff's affidavits as delaying the cause referred to another cause, and contended that the onus of delay lay on the plaintiff. An allegation that some other defendants asked delay was not sufficient excuse as against the present defendant, who was the party affected by the *lis pendens*, which it was the object of the present motion to get rid of.

THE SECRETARY.—There has been great delay in the prosecution of this suit. The delay is said to be at the request of the defendants, but this they positively deny, and they are not cross-examined on their affidavits. I dismiss the bill with costs.

## MEYERS v. BARKER.

*Married woman.*

An application for an order to serve a married woman as if a *feme sole*, and for an order for substitutional service upon her for her husband who could not be found, was refused, he not being shewn to be out of the jurisdiction.

[May 27, 1869.]

*Mr. Boyd* moved for an order for leave to serve the defendant Margaret Barker, as a *feme sole*, and for substitutional service on her husband who could not be found to be served personally.

THE SECRETARY.—I am asked to grant an order for serving the defendant Margaret Barker, a married woman, as if a *feme sole*, on the authority of a case in 2 Vern. and a passage in *Daniell's Pr.*, and also for an order for substitutional service upon her for her husband, who cannot be found to be served personally. I do not think I can grant an order, to serve the wife as a *feme sole*. In *Daniell's Pr.*, vol. 1, p. 503, it is said that where the suit relates to the wife's separate property, "and the husband is beyond the seas, and not amenable to the process of the Court," the wife may be served with the subpoena and compelled to answer. It is, however, necessary that he should "be actually out of the jurisdiction." In the form of order given in *Seton*, p. 1540, it is recited that the husband "is by the plaintiff's bill stated to be out of the jurisdiction."

In this case, the bill alleges that "all the said defendants reside in the village of Wroxeter, in the County of Huron," and there is no evidence on this application that the defendant, the husband, is out of the jurisdiction. The affidavits are, one made by a clerk of the plaintiff's solicitor, that he enquired of the wife as to her husband's residence, which she declined to inform him of, and that the father and mother of the husband stated that they did not know his whereabouts; and another made by a bailiff, who says he has been endeavouring to serve the husband, but that he has been

unable to do so because in January last he left his residence, and has not since returned to it; but that his wife and children are living in the house he formerly occupied. The plaintiff also makes an affidavit that he had an interview with the wife to try and arrange for a settlement of the suit, that she agreed to one, provided her husband would concur, and asked two weeks time to obtain his assent; but that he has since heard nothing further from her, and that she declined to inform him of his whereabouts.

I do not think I can grant the order for substitutional service on the wife for the husband. Personal service of a bill is not necessary (*Elliott v. Beard*, 2 Cham. R. 80; *Edgson v. Edgson*, 3 DeG. & S. 629), and the affidavits shew that service can be effected on a grown-up person at his dwelling house.

If the plaintiff desires to serve the husband personally, or desires to give positive evidence that he is out of the jurisdiction, he can surely, by examining the wife, ascertain the true facts. She evidently knows where he is from asking two weeks time to communicate with him about the proposed settlement.

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#### ANDERSON V. KILBORN.

*Parties to be served with decree.*

Where the parties who would become interested under a decree as kin of a testator are very numerous, and difficult to serve, the court will, in its discretion, dispense with service on them, or some of them, and direct one of a family or class to be served.

[May, 1869.]

*Mr. Ashbough*, for the plaintiff, moved *ex parte* to dispense with service of a copy of the decree upon certain persons whom it would be necessary to serve unless service was dispensed with, under the circumstances appearing in the judgment.

**THE SECRETARY.**—The plaintiff asks that service of office copies of the decree upon a number of persons should be dispensed with.

From the affidavit made by a niece of the testator, herself a very aged woman, it appears that the testator died in 1857; that his wife is since dead; and that he left no family. His only brother died in 1858, unmarried. The testator had nine sisters, all of whom were married; eight of these the deponent knows to be dead, and of the other nothing has been heard for over forty years; but as, if living, she would now be over 120 years of age, she may also be safely presumed dead. The deponent knows that all these sisters left descendants, some of whom are also dead, leaving children; but she does not know the names or exact number of these children. To serve them all with the decree is impossible, as they cannot all be found; and to serve even those who are known would be exceedingly expensive, as they are scattered from Nova Scotia on the east, to Minnesota on the west, and south as far as Carolina.

By the General Orders of the court relating to parties after provision is made for the prosecution of certain suits by persons who are some only of the parties interested, it is provided (General Order 60) that "In all the above cases the persons who, according to the practice of the court, would be necessary parties to the suit, are to be served with an office copy of the decree (unless the court dispenses with such service), endorsed, &c."

Under the old rules as to parties, these persons would not, as next of kin, have been necessary parties, or, at most, one of them only would have been necessary, and then the Master would have enquired who are the next of kin (*Calvert*, 58; *Caldecott v. Caldecott*, Cr. & P. 183; *Waite v. Temple*, 1 S. & S. 320).

These people are, however, heirs-at-law, and, as such, would have been necessary parties. In England, where the law of primogeniture obtains, there would be no difficulty in making the heir-at-law (one person) a party. Here, primogeniture having been abolished, the heirs-at-law are often, as in this case, very numerous.

I think however, I should dispense with service upon most of the persons referred to in the affidavit. In

*Powell v. Wright* (7 Beav. 449), when disposing of an objection for want of parties, Lord Langdale said : " Every body must be conscious of the great difficulties which exist in cases of this kind. The court, in conformity with the principles of equity, has adopted a general rule, not to dispose of any matter, not to bind any man's interest, or make any declaration of any man's right in his absence. The complication of human affairs has however become such, that it is impossible always to act strictly on this general rule. Cases arise in which, if you hold it necessary to bring before the court every person having an interest in the question, the suit would never be brought to a conclusion. The consequence would be that if the court adhered to the strict rule, there would, in many cases, be a denial of justice. This has induced the court to sanction a relaxation of the rule ; and, accordingly, they have said, if we can be satisfied that we have before the court persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons ; and if we are then satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund on the representations of the persons present."

In several other cases his lordship expressed himself in similar language (*Smart v. Bradstock*, 7 Beav. 500; *Bunnell v. Foster*, 7 Beav. 540).

Here I think every object will be attained by the Master directing a few of the persons interested to be served, selecting say one from each of the families resident in Canada.

This order being made, does not of course, dispense with the necessity for the Master enquiring and reporting as to who are the heirs-at-law and next of kin.

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**CHISHOLM V. ALLEN.***General Order 464—Delivery of possession.*

General Order 464 applies only to mortgage cases, and not to suits for specific performance. Where an order was asked for delivery of possession in a case for specific performance, the Secretary refused it.

[June 1, 1869.]

*Mr. Walker* moved for an order for delivery of possession on the usual affidavits, the defendant being in possession. To an inquiry by the Secretary it was stated that the suit was one for specific performance, in which a decree had been made for the rescission of the contract in default of payment. Default had been made, and defendant having taken possession under the contract, the plaintiff now sought to obtain delivery up of possession under General Order 464.

**THE SECRETARY.**—The suit is one for specific performance, and the decree directed rescission of the contract in default of payment. Default was made, and an order taken out rescinding the contract. General Order 464 does not apply to such a suit, and I can make no order.

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**McGRATH V. McGRATH.***Interim alimony.*

*Interim alimony* will be granted on *prima facie* proof of the marriage, although the validity of the marriage is disputed.

[June 2, 1869.]

*Mr. A. Hoskin* moved for an order for *interim alimony* and for disbursements. He read affidavits proving the marriage of plaintiff and defendant by a Presbyterian clergyman in Toronto, in October, 1854, and produced a certificate of marriage of that date between the defendant and Mary Anne Smith, spinster. The desertion of the plaintiff, &c., was shewn as having taken place in 1867.

*Mr. Moss*, contra, admitted that the ceremony of marriage had been performed between the parties at the time and place mentioned, but set up that the marriage was not valid, the plaintiff having been previously married, and her former husband being still alive. The affidavits on part of defendant alleged that the plaintiff had represented herself as a widow, and had called herself Mary Anne Bailey, and that defendant did not know for some time after the alleged marriage that she had given her name to the clergyman performing the ceremony as Mary Anne Smith. He first knew of the first husband being alive in 1862. A certificate of a justice of the peace in Buffalo was read, shewing that on 8th November, 1850, he married Anne Iles to Lyman A. Smith, in the City of Buffalo. An affidavit of Lyman A. Smith was also read to the same effect, and stating that the plaintiff is the person referred to in the certificate, and that after living with him twenty months, she had left him: that he saw her in Hamilton and in Toronto in 1855. In August, 1863, he obtained a divorce from her in Buffalo. An affidavit by the defendant stated that plaintiff had admitted to him that she had a husband living, and that she had seen him in Hamilton. On the other hand, the plaintiff swore that she never knew or heard of Lyman A. Smith till she saw his affidavit: that she consequently never was married to him: that she had been married to one Bailey, who went to San Francisco and was drowned there before her second marriage: that she was forced to go to service, and assumed her maiden name, under which she was married to defendant; she had never met Lyman A. Smith, &c.

*Mr. Hoskin*, in reply, referred to *Cullen v. Cullen*, where interim alimony was granted, although the legality of the marriage was questioned; also to *Nixon v. Nixon*, decided by Vice Chancellor Esten, in 1862; and he contended that the question of legality of the marriage, or whether plaintiff had committed bigamy could not be tried on affidavit on a motion like the present; that a sufficient *prima facie* case had been established to entitle the plaintiff to interim alimony.

*Mr. Moss* urged that a sufficient doubt had been thrown on the plaintiff's case to disentitle her to the relief she sought.

THE SECRETARY reserved judgment; and afterwards decided to grant the order for interim alimony, saying that the question set up on the affidavit was one to be tried in the cause, and not on the present motion. A marriage *de facto* was shewn, and he could not try its validity.

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#### LAWSON v. CROOKSHANK.

*Jurisdiction—Imprisonment for debt—Con. Stat. cap. 26, sec. 7.*

The provisions of the Con. Stat. cap. 26 Act apply to the Court of Chancery, and a debtor confined under a writ of arrest may apply for his discharge under section seven thereof.

[June 14, 1869.]

*Mr. Moss*, on behalf of the defendant, moved for his discharge under the above act.

*Mr. Macdonald* took a preliminary objection, that the defendant had given notice of an application for his discharge under the Insolvent Debtors Act, cap. 96, 22 Vic., and a demand for his examination had been made which was not yet complied with, and urged that this motion should stand until after the examination.

THE SECRETARY considered that the question as to whether the defendant could apply for his discharge here might very well be disposed of without waiting the result of his examination.

*Mr. Moss*.—The Statute 22 Vic., cap. 96, enacts that a writ of arrest shall be granted on the same conditions as a writ of *capias* is granted at common law, and that a prisoner under a writ of arrest shall be admitted to bail on the same terms as if he were in custody under a writ of *capias*.

The act Con. Stat. cap. 26, also provides for the discharge of a debtor under certain conditions, and limits the jurisdiction of this court to the cases mentioned in the act. The jurisdiction of this court is in the cases mentioned placed on the same footing as the jurisdiction of the common law courts in cases of *capias*. The defendant shews he is insolvent within the terms of that act, and is consequently entitled to his discharge.

*Mr. Macdonald*, contra, contended that the prisoner was not merely in custody for debt, but on the grounds of breach of trust. That under the 8th section of the Insolvent Act a debtor could not apply for his discharge until he had been examined, and that the court had not jurisdiction to order the defendant's discharge, the provisions of the act not applying to cases of parties in custody under a writ of arrest.

*Mr. Moss*, in reply, would not ask that defendant be discharged until after his examination; but he desired to have the question of jurisdiction disposed of.

THE SECRETARY.—Looking at the provisions of the various statutes relating to imprisonment for debt, I have no doubt whatever that the provisions of Con. Stat. cap. 26, sec. 7, apply to this court, and that a defendant confined in close custody under a writ of arrest may apply for his discharge under that section.

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#### WHITE v. KIRBY.

##### *Arbitration.*

Where parties had entered into an agreement to refer any future differences that might arise under a partnership between them to arbitration; and one filed a bill for an account, injunction, and receiver, on an application for a stay of proceedings under the Common Law Procedure Act, the Secretary granted the order, though answer had been filed in the suit, and the bill contained allegations of fraud, it being evidently a case in which substantial justice between the parties could be done by arbitrators.

[June 14, 1869.]

*Mr. Moss* moved under the arbitration clause in the Com-

mon Law Procedure Act for a stay of proceedings. The bill alleged that the plaintiff and defendant in 1865 entered into an agreement under seal as co-partners in farming, &c. That defendant had neglected to preserve the fruit trees on the farm, &c., and had improperly sold the property of the partnership at less than current prices: that he had neglected to give the plaintiff notice of the threshing of the grain, &c., and had refused to account, &c.; and that a receipt for \$800, purporting to be signed by plaintiff, and claimed to be allowed by defendant, was a forgery; and prayed for an injunction and account and the appointment of a receiver. The plaintiff's affidavits verified the bill. The defendant's affidavits denied them, and set up that he was willing to refer the matters in difference to arbitration.

**Mr. Moss**, in support of the application, contended that the court had a discretionary power to grant a stay of proceedings under circumstances of this kind. It had such power before the passing of the Common Law Procedure Act. Parties could not then bar their right to come to this court by any agreement of their own, and the present case was stronger, for the defendant had shewn every readiness to submit the differences with the plaintiff to arbitration, as provided for by the agreement between them, and authorized by the act. He cited *Herton v. Swyer*, 4 H. & N. 643; *Russell v. Pellegrini*, 6 E. & B. 1020; *Wallis v. Hirsch*, 1 C. B. N. S. 316; *Lury v. Pearson*, 1 C. B. N. S. 639; *Wheatly v. Westminster Mining Company*, 2 D. & S. 347; He admitted that in *Wallis v. Hirsch* the court had refused to stay the proceedings, because ground was shewn; here there is a mere allegation in the bill of fraud, which is not sufficient.

**Mr. S. H. Blake**, contra. The cases relied on the other side are all common law cases, where the court preferred to leave the question to arbitration rather than to a jury: they are not applicable to a case like the present, where there are proper officers of the court able to deal with the matters of account involved in the litigation, and who could dispose of them more properly and cheaply than arbitrators could.

Besides, the relief asked was what could not be given by arbitrators; a receiver and injunction were prayed for, and the application also was made too late: it should be made before plea or answer.

*Mr. Moss*, in reply, contended that it was in the furtherance of justice he made the application. The litigants had chosen their tribunal, and that tribunal could afford them effectual relief. There was no need of appointing a receiver to a farm, and as to an injunction, there is no case made for one. In *Wallis v. Hirsch*, Crowder, J., says: that it would be very easy to avoid arbitration if an allegation of fraud is all that is necessary to prevent the court from exercising its discretionary power. The arbitrators can compel the furnishing of accounts if they are refused; and by the very agreement of the parties he can order a dissolution, if he finds it necessary to do so. He cited *Green v. Waring*, 1 W. Black 475; *Hutchinson v. Whitfield*, Hay's Irish Ex. R. 78; *Longwood v. End*, 2 A. & E. 505; *Wood v. Wilson*, 2 C. M. & R. 241.

**THE SECRETARY.**—I think I shall stay proceedings in this suit, and leave the parties to arbitrate according to the provisions of the partnership articles. This is just a case in which, I think, the ends of justice will be advanced, and a great deal of expense saved by arbitration.

On many of the points referred to in the bill and affidavits, witnesses must be examined, if the suit proceeds and a reference to the Master is directed, yet most of these are matters which two intelligent farmers could, by personal inspection of the premises, decide much more satisfactorily than any officer of the court could after hearing evidence.

That a dissolution of the partnership is prayed for, and an injunction and receiver does not seem any ground for refusing the application.

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**IN RE HARE CARPENTER V. KELLY.**

*Where interest of absent defendant very small.*

Where the interest of an absent defendant appeared to be very trifling indeed, and he resided out of the jurisdiction, on an application for service on him, by mailing, the secretary made an order dispensing with service on him altogether.

[June, 1869.]

*Mr. J. Hoskin* moved for an order for an order for service on Peter Lee, defendant, who resided in Montcalm County, Michigan, by mailing an office copy of the bill to his address. The defendant was shewn to be one of the next of kin of the testator, and entitled to one-tenth of one-sixth of three-fifth part of his estate.

THE SECRETARY said no order for service was required: that where the interest of the defendant is so infinitesimal, he ought not to be made a party. He would make an order dispensing with the service.

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**DUNLOP v. THE CORPORATION OF YORK.**

*Reading depositions in another suit.*

A motion to read the deposition taken in another cause between other parties must be made on notice.

A motion for such an order made *ex parte* was refused.

*Mr. Evans* moved *ex parte* for an order to read the evidence in a suit of *Dunlop v. Scarlett*.

THE SECRETARY.—If the parties are the same in both suits no order is required; if they are not the same, the motion must be made on notice, and not *ex parte*.

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to impeach a judgment recovered in another suit, and referred in the course of his argument to the following authorities :—  
*Story's Eq. Jur.* sec. 1877, *a*; *Warden v. Jones*, 2 DeG. & J. 76; *Spirett v. Willows*, 11 Jur. 70, S. C. 1 L. R. Ch. App. 520; *Bell's Husband and Wife*, 54; *Murray v. Eli-bank*, 10 Ves. 90; *Suggitt's Trusts*, 3 L. R. Ch. Appl. 215; *Grove's Trusts*, 9 Jur. N. S. 39; *Pegg v. Eastman*, 13 Grant, 187; *DeLesdernier v. Burton*, 12 Grant, 569; *Ball v. Ballantyne*, 11 Grant, 199;

*Mr. Rae*, for certain creditors interested, contra, cited, *Grant v. Grant*, 84 Beav. 624; *Buckland v. Rose*, 7 Grant, 440; *Young v. Christie*, 7 Grant, 312; *McKenna v. Smith*, 10 Grant, 40.

**SPRAGGE, V. C.**—The case appears to me to turn upon a point which was scarcely touched in argument. I am asked to direct the defendant Robertson to file a bill to impeach a judgment recovered in another suit, under which the goods of the execution debtor have been sold by the sheriff, on the ground that such judgment was recovered fraudulently and collusively and is colorable; and was entered, and the execution thereupon issued to defeat creditors and the defendant Robertson, as administrator of the estate of Latham. The debt to Latham accrued in 1854. I must see not only that the judgment is open to the objections urged against it; but that the representative of Latham's estate is entitled to impeach it. He cannot be entitled to do so unless the estate that he represents is entitled to the fund; and if it appears that the fund belongs to a third person in law or in equity, and not to Latham's estate, this application ought not to be granted.

The fund came to the hands of the execution debtor in this way: Mr. Radenhurst by his will devised all his real estate in fee and all his personal estate, subject to the payment of his debts, absolutely to his wife. And the will adds this provision, that in case his wife should marry again, or should die his widow, "without having made any disposal of the property" thereby devised and bequeathed, then that the

same should vest in his executors, in trust for the maintenance and education of the testator's children until they should come of age, and then to be divided among them, or the survivors of them. The widow did not marry again, and is still living.

The widow of the testator sold a parcel of land, part of the real estate devised. For a portion of the purchase money, \$600, a mortgage was given by the purchaser. It was taken in the name of the execution debtor, who was a son-in-law of the widow. It was taken in his name (whether with or without the assent of the widow does not appear); but the object was to facilitate a sale of the security; and it was sold, and the money realized was received by the son-in-law, and used for his own purposes. This took place some time in 1866. Another parcel of the land devised was sold through the son-in-law in May, 1866, or 1867. A portion of the purchase money was paid in cash, and promissory notes were given for the balance, which were turned into cash by the son-in-law, and the proceeds spent and used by him.

In this state of facts it is clear that the widow has made "a disposal," as the will expresses it, of certain portions of the devised real estate; and that, for so much of the proceeds as have come to the hands of her son-in-law, he was and still is her debtor. I say "and still is," because there is not a tittle of evidence to shew that she has made any appropriation of these moneys in favor of her children, or any of them; and there is nothing to shew that she may not at any moment call upon her son-in-law to account for them.

The son-in-law afterwards became pressed with liabilities, and, in October, 1867, he gave a note to a brother of his wife for \$1,800, being for the moneys I have mentioned, and interest. This note was made payable to his wife's brother, *as trustee for his wife.*

There seems to have been a strange misconception as to the wife having some title to these moneys, as one of the children of the testator. The son-in-law, in his evidence

upon this application, speaks of his wife having an interest in the lands devised; under the will of her father; and he says that he treated the moneys he received as part of his wife's share, as he fancied that there would be a great deal more than that amount coming to her from her father's estate; and the note was made payable to the payee as trustee for the wife under the same misconception.

The evidence shews that this note represents the proceeds of the land sold, which came to the hands of the maker of the note; he being, at the time of his receiving those moneys, and of the making of the note, trustee of those moneys for the owner of the land. Suppose he had assigned to a trustee for the benefit of his wife, the mortgage that he received on account of the purchase money of one of those parcels sold, or the notes that he received from another purchaser: or suppose after his receiving those moneys they could be traced into an investment for the benefit of his wife; or suppose again that instead of giving a note when he did, he had given some valuable chattel to the same person as trustee for his wife, in satisfaction of the same moneys: it would make no difference, I apprehend, whether he did this in fraud of his *cestui que trust*, the person really entitled, or under some loose notion or misconception, as to who was really entitled. In all the cases that I have put I should say the party really entitled would have an equity, to have that which represented what she was entitled to, transferred to her. Or, to put another case, suppose a defaulting executor who had used monies of the estate which he was directed to apply in the purchase of securities for certain objects of the testator's bounty, had with his own moneys purchased securities, but misconstruing the will, had purchased them in the name of other than the right objects of the testator's bounty, I cannot doubt that there would be an equity in the right objects to have the securities transferred to them.

Again, to bring the case nearer home, suppose the payee of this note, after recovering judgment, to have realized the amount out of the chattels of the defendant, and to be about to pay it over to the defendant's wife, the party really

entitled would be entitled to an injunction and to relief. Or, instead of the money coming to the hands of the trustee, if the judgment were satisfied by a transfer to the trustee or his *cestui que trust* of the debtor's chattels, which appears to have been the course taken in this case, there would be an equity in the party really entitled to have them transferred to her. It, of course, makes no difference upon this question of equitable right, that from the position of the parties, the right is not likely to be exercised.

In the case of the *Merchants Express Company v. Morton* (15 Grant, 274), I had occasion to consider this point; the defendants had possessed themselves of certain securities belonging to the plaintiffs, by robbery, as it appeared probable, on an express car in the United States; they had converted these securities into Canadian money, and with that money had purchased certain real and personal property in Toronto. I thought it a case in which the court could fasten upon the thing purchased, because it represented, though in another shape, what the defendant had unlawfully obtained from the plaintiffs. Upon the whole then, as between the widow of the testator, and the payee of the note given in respect of the purchase money of her land, and his *cestui que trust*, my opinion is, that the widow is entitled; there was a real debt, the widow was the creditor, the debtor was her trustee, and she is equitably entitled to the benefit of the judgment.

The contention was that there was no real debt, that the moneys for which the note was given were the moneys of the wife, or in some way had become so, and had been reduced into the possession of the husband, who had set up his wife's claim in order to defeat creditors. My conclusion is, that they never were the moneys of the wife.

The sum of the matter is, that the judgment was recovered upon a real debt, upon a cause of action to recover which the widow of the testator was both legally and equitably entitled, and to the benefit of which judgment, she is equitably entitled, as against the judgment creditor, and the person as to whom he stood in the relation of trustee: the

widow is not before the court, and I cannot, in her absence, discuss the question whether the judgment is void under the Statute of Elizabeth, or the Fraudulent Preference Act; or at any rate can pronounce no opinion upon it.

The question comes before me in a peculiar way. I am asked, there being infants interested, to give the sanction of the court to a bill being filed to set aside this judgment. Whatever I might do, if the moneys upon which the judgment was recovered were the moneys of the wife, I cannot see my way to giving any direction when they were the moneys of the widow. It may indeed be said that she ought not to be allowed to gain any advantage by that with which she had nothing to do, and especially when that which was done, was done in order to defeat creditors; that she was supine, and took no steps to enforce her rights; and that what was done, was by the debtor, and that not to protect her, but to defeat creditors; and that with that object, and that alone, he had set up the right of a person not entitled and that person his own wife. But on the other hand, does the motive with which the proceedings were taken, make any difference. A debtor may do that which will have the effect of preferring one creditor over another, so that it be not done in such a way as to come within the mischief of the statutes; and if the motive be that the preferred creditor will afterwards deal with him more leniently than other creditors disappointed by the preference, that will make do difference. Suppose in this case the wife really entitled, as she might be under the Married Womans' Act, and suppose a note given and judgment recovered, as was done in this case, could such a judgment be impeached by another creditor. I apprehend that a trustee of a wife's separate estate, the husband being a debtor to the estate, would stand upon the same footing as any other creditor of the husband. Here was a debtor who was a trustee for some one; he mistook his *cestui que trust* and gave a security to a wrong person, to which security another is equitably entitled. If he had given it to the one really entitled it would not be impeachable. If the person to whom it ought to have been given is equitably

entitled to the benefit of it, does the circumstance of its having been given by error to another make it impeachable in the hands of the person entitled? If it is a correct conclusion that the true *cestui que trust* is entitled to the benefit of the security, then it must, I think, follow that her equitable title is no more impeachable than her legal title would be if she had the legal title.

To take the case of a mere mistake, and a security given with a single desire to do justice to one entitled, though in preference to another, unmixed with any motive of personal advantage influencing the mind of the debtor; if in such a case the security would be unimpeachable in the hands of the person equitably entitled, does the admixture of motives of personal advantage make that impeachable, which would not be so otherwise? I confess I feel great difficulty in arriving at the conclusion that it would.

I have, I confess, felt pressed with this consideration, that it was the debtor, not the creditor, nor even the person assumed to be entitled, who has been the mover in the proceedings by which the judgment and execution have been obtained, and that his motive has been not to secure the real creditor, but to prefer his wife, whom he assumed to be entitled, to his creditors. But on the other hand, I do not know that the debtor being the mover is, *per se*, a reason for impeaching a judgment so recovered. A debtor may fairly, and in some cases very properly, give one creditor a preference over another, morally as well as legally; and if proceedings be originated by the debtor, the creditor may, I apprehend, adopt them and take the benefit of them; then comes the question of personal motive, and also the question of mistake and equitable title, which I have already considered.

I do not mean to express any decided opinion against this judgment being impeachable, but I have so much doubt about it that I think I ought not to direct that proceedings should be taken. It is for the parties interested to say whether they will take proceedings upon their own responsibility.

In the view I take of the matter I must refuse the application, but it will be without costs.

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LAWSON v. CROOKSHANK.

*Executors—Breach of trust—Writ of arrest.*

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire, and the money lost; the court held the executor guilty of a breach of trust with respect to the money, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest.

[June, 1869.]

This was an administration suit, the Master found a large sum due by the executors of whom Crookshank was one, and he was now in custody under a writ of arrest:—A motion had been previously made before V. C. Spragge, for his discharge, on the ground that he had been improperly arrested, and that there was no reason to suppose that he intended to leave the Province, which motion had been refused.

*Mr. M. R. VanKoughnet* now moved that he be discharged from custody on the grounds that he had no property.

*Mr. Spencer*, contra, resisted the motion on the ground that he had property which he fraudulently concealed, and also that the debt was contracted through breach of trust; the defendant's affidavits stated that he had about \$1,800 in his house at a date subsequent to the decree, that the same consisted in part of moneys he had received from the estate during a period of several years, and other moneys of his own, the whole amounting to nearly the sum found due from him: that his house was destroyed by fire in his absence, and all its contents, including this amount burnt, and that he had now no means of payment.

*Mowat, V. C.*, held that it was a breach of trust to keep

the money of the estate for so long a period in his house : that there were several circumstances of suspicion in regard to the alleged destruction of the money, some of which, if the defendant's story was true might have been removed by the testimony of other persons, whose evidence was not given, and that he could not hold the defendant's affidavit to be satisfactory within the meaning of the statute. On these grounds the motion was refused without prejudice to any new application the defendant might be advised to make.

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### ADAMS v. GUILLOTT.

#### *Infants—Costs.*

Where the defendant was shewn to have been an infant at the time when the note *pro confesso* was entered; such noting and all subsequent proceedings were set aside ; but as the defendant was tardy in applying, and his conduct in the matters complained of in the bill censurable, the order was made without costs, and he being now of age he was ordered to answer in a fortnight.

[June 9-14, 1869.]

*Mr. Downey*, for the defendant, moved to set aside a note *pro confesso*, and decree and all subsequent proceedings on the ground that the defendant was an infant at the time when the note *pro confesso* was entered. It was shewn, by the affidavit of the father of the defendant, that the defendant was born on the 30th January, 1848.

*Mr. S. H. Blake*, for the plaintiff, urged that the circumstances set up by the bill debarred the defendant from now making such a motion as the present. The bill alleges that the defendant bought goods of "Adams & Co.", representing himself as of age. To an action at law for the price of the goods, the defendant pleaded his infancy. The bill is filed to restrain his so pleading, on the ground that having represented himself as of age, he could not now take advantage of his own wrong.

It was also shewn by affidavits on part of plaintiff, that defendant had previously bought goods of the plaintiffs for

which he paid, and from his dealings, and his appearance seemed to be of age, and it was alleged, that on his marriage on 13th February, 1868, he declared himself to the clergyman to be twenty-one years of age. This allegation, however, was denied by the defendant's affidavits, and the father's affidavit was corroborated by the entries in the family Bible, and the affidavit of defendant's brother.

*Mr. Downey* referred to Consolidated Order, 518, and urged that it was a total bar to plaintiff's proceedings, which must be treated as wholly irregular.

THE SECRETARY.—I think I must set aside the note *pro confesso* and all subsequent proceedings.

That the court has, in this suit, decided that the infant should not be allowed to plead infancy in the action-at-law, does not seem to me a reason for saying that the order *pro confesso* should stand against him even though an infant when the bill was served.

There are many other cases to which a plaintiff is entitled to the relief asked against an infant defendant, yet he must proceed in a regular way to obtain that relief.

Had the infant in this case filed an answer admitting all the facts alleged in the bill, he would not have been bound by it, and the plaintiff must have proved everything against him. A note *pro confesso* cannot have any further effect as an admission of the truth of the bill than an answer would have. Looking at the defendant's conduct, however, and the great delay in making this application, I give him no costs. As he is now of age, I think I should require him to answer or demur; if so advised, within a fortnight, otherwise the bill may be noted *pro confesso*.

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## IN RE MEIN—A LUNATIC.

*Notice to Lunatic.*

Notice of a motion to declare a person a lunatic and to apply the estate of an alleged lunatic to his maintenance, &c., in a lunatic asylum, should be served on the lunatic personally, if it is practicable to do so, without danger to his health or state of mind. Where, therefore, a notice of such a motion had not been served on the ground that doing so would be useless in consequence of the state of the alleged lunatic; the Secretary directed that some medical man, other than the physician of the asylum, should visit the asylum and give evidence as to the state of the lunatic, and whether service could be effected on him.

[June 19, 1869.]

This was an application on petition praying, that John Mein might be declared a person of unsound mind; that if necessary a committee or committees of his person and estate might be appointed; that proper inquiries might be made as to the claim of the asylum (in which the alleged lunatic was an inmate); and that the same, if properly chargeable, might be paid.

*Mr. J. C. Hamilton*, in support of the petition, read the affidavits of the brother of the alleged lunatic, and of others, alleging that the said John Mein had, on the certificate of three medical men, been committed to the Provincial Lunatic Asylum, in the year 1863, as insane, and had remained there ever since; that he had owned a certain farm and some chattels which had been sold under order of the court, and the money paid into court, and a balance was still there in his favor; that the asylum claimed a balance of \$320, which it was sought to have paid out of the money in court, and other money coming due on a mortgage taken to secure part of the purchase money of the farm; that the said John Mein was still insane. The superintendent and assistant-physician made affidavit as to the condition of Mein, stating that he was "imbecile, childish, and idiotic," and in a state of what is described as "dementia."

No notice had been served on the supposed lunatic, nor was it alleged that it would be dangerous to his health or state of mind to serve him.

The ground urged for dispensing with such personal service was, that it would be useless and fruitless to serve him owing to his imbecility.

**THE SECRETARY.**—The petition in the matter prays that John Mein, who is entitled to certain moneys now standing in court, may be declared a lunatic, and that these moneys be applied in payment of a claim which the Provincial Lunatic Asylum has for his past maintenance, and in payment of the asylum charges for the future. The petition is presented by the bursar of the asylum, and by a brother of the alleged lunatic.

He appears to have been admitted into the asylum as a patient about six years ago, and to have lived there ever since.

The evidence adduced in support of the petition consists of two affidavits from the medical superintendent and his assistant, deposing to the condition of the lunatic since he came under their charge: an affidavit from the brother as to his state before he was admitted to the Asylum, and a copy of the medical certificate upon which he was received as a patient.

No notice of this application has been given to the alleged lunatic, and the affidavits of the medical men are relied upon as shewing that no good would be gained by serving the petition upon him.

Personal service upon the alleged lunatic of a copy of the petition is not essential, but as the object in serving him is that he may have an opportunity of appearing on it and shewing the court that he is not really a lunatic, it would scarcely be safe for the court to dispense with service, upon the unsupported testimony of the medical officer in whose charge the patient is, and who, if he is wrongfully confined, has an interest in preventing access to him.

I propose, therefore, to direct that in this case a medical man, named by the court, shall visit the alleged lunatic and report upon his condition before any order is made. I am the more inclined to adopt this course because in this case

the asylum authorities are, by their bursar, petitioners, and seek to have the estate of the lunatic paid over to them.

In giving this decision, I do not desire to impute any thing improper to the able medical superintendent of the asylum, or to be considered as entertaining any suspicion of the correctness of his statement, that no good is to be gained by serving the lunatic. I so direct solely because, as a general principle, the court in dispensing with service on an alleged lunatic, should have independent testimony that such service would be dangerous or useless.

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#### CAYLEY V. COLBERT.

*Infants—Immediate sale.*

Where it appeared to be for the benefit of the infants interested, and the plaintiffs who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants without requiring the consent of the mortgagor.

[June 25, 1869.]

*Mr. J. Hoskin*, on the part of the guardian of the infant defendants, moved for an order for an immediate sale. The estate was very small, the circumstances of the infants poor, and the value of the premises only slightly exceeded the amount due on the plaintiff's mortgage.

*Mr. Allanby*, on part of the plaintiffs consented, if the Court thought such an order could properly be made.

**THE SECRETARY.**—The guardian of the infants asks that there should be a sale instead of a foreclosure as prayed by the bill.

The value of the mortgaged property slightly exceeds the amount due to the plaintiffs.

As the plaintiffs are very poor, and have no means of redeeming, to give the usual six months time would be merely a matter of form, and the saving of the six months subsequent

interest is of importance to them; indeed, as the subsequent interest, the expense of first taking the account, and then obtaining the final order for sale, would almost eat up any little sum likely to be realized after paying off the plaintiffs, the guardian desires an immediate sale. To this the plaintiffs do not object, but suggest a doubt whether, the bill being *pro confesso* against the widow of the mortgagor who is interested in the equity of redemption, an immediate sale can be ordered without her consent.

In *Newman v. Selfe* (33 Beav. 522), a sale was ordered before the expiry of the usual time, though the counsel for the mortgagor opposed its being granted, arguing that as a mortgagor was entitled to six months to redeem, so he was entitled to a delay of six months before a sale, in order to enable him to make arrangements for paying off the mortgages.

In that case the Master's report, after remarking on the 15 and 16 Vic. ch. 86, s. 48. which is similar to our Order 428, said, "I am of opinion that it is not obligatory on the court, either to require the consent of the mortgagor, or to give him any time to obtain the money. It is true that six months are usually given for that purpose in cases of foreclosure; but, if all the other incumbrancers require a sale, and the mortgage has been in arrears for many years, and the interest is still unpaid on any of the mortgages, the court has power to direct a sale at once, if it thinks fit.

Here the mortgage is overdue and only the first six months interest appears ever to have been paid upon it. The infants who are chiefly interested desire an immediate sale as more beneficial for them, and the plaintiffs, the only incumbrancers, consent. I think, therefore, I can grant this relief asked without requiring any consent to be procured from the widow.

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**MILLS v. CHOATE.***Opening foreclosure.*

THE recovery of a judgment against the defendant after a final order of foreclosure has the effect of opening the foreclosure and letting the defendant in to redeem.

In such a case the Secretary made an order giving time for redeeming, that part of the order being acquiesced in;—putting the defendant on terms to pay subsequent interest and costs, and that writ of assistance issue without further order if default made in payment at time named.

[June 14, 1869.]

*Mr. Hodgins* moved on petition on behalf of the mortgagor to open foreclosure. Two judgments had been recovered at law on securities collateral to the mortgage since the final order for foreclosure, and he relied on this as having the effect of opening the foreclosure.

*Mr. S. H. Blake*, for plaintiff, contra, submitted that the plaintiff was willing to be redeemed, and had offered to allow the foreclosure to be opened and give up the collateral securities upon payment, but the defendant was not prepared to redeem, and the land was not worth the amount of the incumbrance.

*Mr. Hodgins*, in reply, cited *Fisher on Mortgages*, p. 597, to shew that where a foreclosure is opened, immediate payment will not be ordered if the security is sufficient, which he contended it was in this case.

*Mr. Blake* further argued, that in a motion of this kind it was imperatively necessary to shew what exertion had been made to raise the money, and the source whence it is expected to be procured, and that there is a probability of its being obtained.

**THE SECRETARY.**—The recovery of a judgment after the final order has opened the foreclosure, and the defendant must be allowed an opportunity of redeeming. The plaintiff is quite willing to be redeemed, so the only question I have to consider is the terms of redemption. The plaintiff, before the making of this motion, offered to be redeemed, but the defendant has proceeded with his motion. I suppose in

order that the final order already obtained being set aside or declared to be gone by the recovery of the judgment, the order for delivery of possession obtained after the final order may fall with it.

As the mortgage is undoubtedly over due, the mortgagee is entitled to take possession, and I think, looking at all the facts of the case, that I can on this motion impose terms as to possession. I do not know that I could prevent the mortgagee taking possession at once, but the plaintiff having offered on this motion to stay all proceedings for that purpose until the first of July next, enables me to frame my order as I propose doing. The order I make is, that the time for payment be extended until the 21st August, but the defendant may, if he chooses, pay on the first of July. The execution of the order for delivery of possession is to be stayed until the first of July, but if the money is not paid on that day the plaintiff may issue a writ of assistance without further order.

The defendant must pay subsequent interest and costs, including the costs of the present motion.

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#### BROUGHAL V. HECTOR.

##### *Motion to commit.*

A motion to commit must be made on four days' notice. Where, therefore, an application for an order to put in a better affidavit on production or be committed was made on two days' notice, the Secretary refused the motion.

[June 28, 1869.]

*Mr. Hurd* moved for an order for the defendant to file a better affidavit as production, or be committed.

*Mr. Hector*, contra.

It appeared that only two days' notice had been given, and following the decision in *Gray v. Hatch*, 2 Cham. R. 12.

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THE SECRETARY refused the motion.

## RE MCGRATH.

*Lunatic—Sale of estate of—Notice.*

Where the heirs at law or next of kin of a lunatic are unknown, or reside at a distance, and service on them would be attended with great expense, the court may, in a proper case, dispense with service of notice on them.

[June 30, 1869.]

*Mr. Macdonald* moved under the circumstances appearing in the Secretary's judgment for an order for a sale of certain real estate of the lunatic.

**THE SECRETARY.**—In this matter an application is made for the sale of a lot of land belonging to a lunatic, and the facts of the case seem to warrant a sale being ordered.

No notice has been given to the heirs-at-law or next of kin of the lunatic, and it is sworn that though he is believed to have relatives in the United States, yet their residence is unknown, so that they cannot be served with notice of the present proceedings.

In England it would appear to be necessary that the heir-at-law and next of kin should have notice before a sale can be ordered: *Shelford on Lunacy*, 366. Our statute: Con. Stat. U. C. c. 12, s. 38, sub-sec. 3; says, that on an application to mortgage, lease, or sell the real estate of a lunatic, the court is to enquire into the truth of the representations made in the petition, and hear all parties interested in the real estate." These words, "parties interested in the real estate," may mean persons having charges or incumbrances thereon.

The 13th section of the statute relating to the Provincial Lunatic Asylum of Toronto: Con. Stat. U. C. c. 71; empowers the bursar of the asylum in certain cases to lease, mortgage, sell, or convey all or any part of the lunatic's property as fully and effectually to all intents and purposes as the lunatic could do if of full age and of sound and disposing mind. For the purpose of carrying out such sale the statute does not require notice to be given to the heir-at-law or next of kin: sec. 14; but merely that before any such sale or con-

veyance, the bursar shall report the case, with the terms of the proposed sale, to the county judge of the county in which the land is situate for his approval, and declares that, "such sale and conveyance so approved of shall be valid and binding upon the lunatic and his heirs."

Looking at that statute by which the legislature has conferred such extensive power upon the bursar of the asylum, and remembering the circumstances of this province that many people have no relatives resident here, and that the estates with which the court has to deal are in most cases small, it may be more convenient to hold that the words "parties interested in the real estate," means persons having charges or incumbrances. Taking that view of the statute I think that where the heirs-at-law and next of kin are unknown, or where they reside at a distance, and service on them would be attended with great expense, the court may in a proper case proceed to the sale of a lunatic's estate without requiring notice to be served on such persons.

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#### DICKSON v. BURNHAM.

*Leave to rehear.*

A motion for leave to rehear a cause after the time limited for rehearing has expired may be made *ex parte*.

[August 23, 1869.]

*Mr. Cattanach* moved *ex parte* for leave to set down this cause for rehearing, notwithstanding that six months had elapsed since decree pronounced.

THE SECRETARY.—The defendant applies for leave to rehear this cause although more than six months have elapsed. The application is made *ex parte*. It appears that the decree was pronounced on the 29th of January, 1869, and was passed and entered without any delay. A copy was served on the defendant's solicitor on the 10th of February. The rehearing term began on the 16th of February, so that the defendant could not set the cause down for rehearing at

that term. The next term is on the 26th of August, six months and twenty-eight days after the date of the decree. In April the cause was set down for rehearing, and notice served, the solicitor not observing that the term did not arrive till after the expiry of the six months.

I doubted whether the motion could be made *ex parte*, but on looking at General Order 324, it appears that notice is not essential. In the present case no answer can be made to the application. It was impossible for the defendant to hear the cause within the time limited by the General Order. I therefore grant leave to set the case down for rehearing at the approaching term.

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#### McGOAY v. MALADAY.

*Next friend—Security for costs.*

Where the next friend of a plaintiff has become insolvent and left the jurisdiction, the proper order to be made is, that proceedings be stayed until a solvent next friend be appointed, or until security for the costs be given.

[August 26, 1869.]

*Mr. Moss* moved that proceedings be stayed until security for costs be given, the next friend in the cause having become insolvent, and having also left the jurisdiction.

*Mr. Donovan*, contra, contended that the defendant was not entitled to the order for security for costs unconditionally, the plaintiff might appoint a new next friend who was solvent, or might obtain leave to sue in *forma pauperis*.

**THE SECRETARY.**—The defendant moves to stay proceedings in this suit, on the ground that the next friend of the plaintiff has become insolvent and has left the Province. The plaintiff's solicitor does not dispute the facts as alleged for the defendant.

I am asked to make the order, not that proceedings be stayed until a new next friend is appointed or security given, but that proceedings be stayed until security is given.

The solicitor for the defendant relies on two passages in *Daniel's Practice*, as shewing this to be the proper order when the next friend either becomes insolvent or leaves the country. Here he is both insolvent and has gone out of the jurisdiction. The language used in *Daniel* (pp. 111, 113), certainly supports the contention of the defendant's solicitor but the cases cited as authorities do not bear out Mr. Daniel's statement of the practice.

Both in *Alcock v. Alcock*, 5 DeG. & Sm. 671, where the next friend of the plaintiff became a resident abroad, and in *Wilton v. Hill*, 2 D. M. & G. 807, where he became insolvent, the order made was, that security for costs be given or a new next friend be appointed, with a stay of proceedings in the meantime.

In *D'Oechner v. Scott*, 24 Beav. 239, the next friend having become insolvent the order made was, that the proceedings should be stayed until a solvent next friend was appointed, or until the plaintiff obtained leave to sue *in forma pauperis*. I therefore make a similar order to that in *Alcock v. Alcock*.

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#### HARRISON v. GREER.

*Ex parte motion—Examining defendant.*

An application for an order for the defendant to attend at his own expense, and be examined on his answer, may be made *ex parte*.

[August 30, 1869.]

*Mr. Boyd* moved *ex parte* for an order for the defendant to attend, and be examined on his answer, at his own expense, he having failed to attend an appointment of the Master previously made.

A question arose as to whether such an order could properly be granted *ex parte*.

THE SECRETARY held it might properly be so made.

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## BUCKLEY v. OUILLETTE.

*Motion for delivery of possession.*

A motion for delivery of possession must be made on notice.

[August 30, 1869.]

*Mr. Holmsted applied ex parte for an order for delivery of possession.*

THE SECRETARY refused the application, considering it should be on notice.

## COATES v. EDMONSON.

*Endorsement of papers—Orders 40 and 41.*

Under general orders 40 and 41 it is necessary that the name of the solicitors, and if agents, the name also of the principals for whom they act, should be endorsed on all the papers served in the suit, the provision in order 41 only renders it unnecessary to endorse the "place of business" in subsequent papers after it has been endorsed on the first paper served.

[August 31, 1869.]

*Mr. Bain, on the part of the defendant, moved to commit the plaintiff for not obeying the order to produce.*

*Mr. Macdonald, contra, objected that the notice of motion was not properly endorsed as required by general order 40.*

THE SECRETARY.—The order to produce, issued and served, was endorsed with the names of the solicitors issuing it, thus: "*Paterson, Harrison & Bain*"; the notice of motion to commit the plaintiff for not obeying the order is signed by *Paterson, Harrison & Bain*, agents for *Moberly & Gamon*, solicitors for the defendant," &c.

For the plaintiff it is contended, that the order not being properly endorsed as required by general order 40, the service was irregular, and that as all the proceedings on which to found an order to commit must be strictly regular, no order can be made on the present application.

The general order 40 requires that upon every writ sued out, &c., there shall be endorsed the name or firm and place of residence of the solicitor or solicitors by whom such writ has been sued out, &c., and when such solicitors are agents only, then there shall be further endorsed the name or firm, and place of business of the principals for whom they act. General order 41 provides simply, that when the name and place of business of the solicitor has been endorsed upon any paper, it shall not be necessary to endorse such place of business on any pleadings or pleading in the same cause or matter subsequently filed or subsequently served on any person who was served with the former proceeding. It does not say that when a proceeding is subsequently taken by an agent it shall be sufficient to endorse the name of the principal solicitor only, or of the agent only. It is in such a case necessary to endorse the names of both the principal solicitor and the agent.

I think I should give effect to the objection and refuse the present application.

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#### HARRISON V. GRIER.

*Amending after decree.*

An application to amend after decree, under order 438, by adding a party interested in the equity of redemption, need not be on petition, but is properly made on motion.

Whether such a motion was opposed on the grounds of irregularity as not being by petition, the costs of opposing it were refused.

[August 31st, 1869.]

*Mr. Bain* moved after decree for leave to add a party interested in the equity of redemption, but whose rights he did not know of until after the decree had been taken.

*Mr. Boyd*, contra, contended that such an application after decree could only be obtained upon petition. He cited *Rumble v. Moore*, 1 Ch. Rep. 59, in support of this position.

*Mr. Bain*, in reply, argued that *Rumble v. Moore* was decided before the order, under which the application was made, was promulgated.

THE SECRETARY.—The plaintiff having discovered since he obtained his decree that a person not a party to the suit is interested in the equity of redemption, seeks to have him added as a party in the interlocutory order, under order 438, and for this purpose has served the persons already parties with notice of motion for such an order. The objection is taken that it is irregular to proceed by notice of motion, a petition being the proper mode of bringing the matter before the court: *Rumble v. Moore* (1 Cham. Rep. 59), is cited as the authority for this.

It is true that in that case the late Chancellor made an order on petition following the decision of Vice Chancellor Esten, though he himself thought a motion would have been the proper course, but that case was decided before order 438 was passed, and when the only mode of bringing such a party before the court was by petition or some proceeding in the nature of a supplemental bill. Order 438 does not point out in what mode the appeal is to be made, and in *Prince v. Canniff* (1 Cham. Rep. 351) where the appeal was made *ex parte*, the report of the case says: "Mowat, V. C., declined to grant the order *ex parte*, and directed notice to be served; and as the order is silent as to the mode of proceeding I think I should hold a notice of motion sufficient. No statement of facts is necessary for the purpose of bringing the matter before the court, and a proceeding by petition is the more expensive mode of the two."

The defendant who appeared had no cause to shew against the person proposed to be added being added, and as he only appeared to take an objection to the form of the proceedings in which he has failed, I do not grant him the costs which he asked.

## WESTMACOT v. COCKERLINE.

*Motion for order to execute deed.*

An application for an order to compel a party to execute a deed directed to be executed should be on notice, and will not be granted *ex parte*.

[September 1st, 1869.]

*Mr. Macdonald* moved *ex parte* for an order to compel the defendant to execute a deed which he had been directed to execute, the deed had been settled by the master.

THE SECRETARY.—On the authority of *Morley v. Clavering* (30 Beav. 108), and *Needham v. Needham* (1 Hare 633) refused to make the order *ex parte*, and directed notice to be given.

## WADDLE v. McGINTY.

*Non attendance of parties.*

On an application that a witness be ordered to attend before a master or examiner at his own expense, the evidence of his default should shew that he was duly subpoenaed, the certificate of the master or examiner that evidence of the service of subpoena had been produced before him, will not be held sufficient.

[September, 1869.]

*Mr. C. Moss* moved that one Jaspar Gooding be ordered to attend before the special examiner at Goderich, to be examined at his own expense, and shewed that Mr. Gooding had failed to attend before the master on a certain occasion when it was alleged he had been duly subpoenaed and paid his fees. No proof of the service of the subpoena was given before the Secretary; but the certificate of the special examiner (who was also master, but not in this instance acting as such) stated that evidence of service of subpoena had been given before him.

THE SECRETARY refused the application on the ground of the absence of any affidavit of the service of the subpoena.

## DUNCAN v. ROSS.

*Infants.*

The court will exercise a supervision over solicitors appointed guardians ad litem, and expect at their hands a proper attention to the interests of the infant parties.

[September, 1869.]

*Mr. Downey* moved for a decree of foreclosure against the infants.

The guardian of the infants although served did not appear.

THE SECRETARY said that guardians in the country often forgot their duty to the infants, and seemed to consider that they had nothing to do except to take the costs which they are allowed. There was no affidavit of the value of the premises, nor any certificate shewing whether there were subsequent incumbrances or not.

The motion stood over to allow affidavits to be put in as to the value of the property, so that it might be seen whether a sale or foreclosure would be most to the advantage of the infants, and to ascertain whether a reference as to subsequent incumbrances was necessary. No costs to be allowed to the guardian.

## STEWART v. RICHARDSON.

*Ex parte orders.*

The court does not favor the granting of *ex parte* orders, except in case where the practice clearly authorizes them. An application to compel the defendant's solicitor to deliver an office-copy of the answer was refused, because made *ex parte*.

[September 18, 1869.]

*Mr. Read* moved for an order to compel the defendant's solicitor to deliver an office-copy of the answer.

No notice of the motion had been served.

THE SECRETARY refused to make the order.

**PHERILL v. PHERILL.***Costs—Imprisonment.*

The court will not hold a party who has been in contempt for not obeying an order, in gaol for non-payment of the costs occasioned by his contempt.

[September 14, 1869.]

*Mr. A. Hostin* moved for the discharge of the defendant David Pherill, and to set aside the sequestration issued in the cause. The defendant, it appeared, was in gaol for not executing a deed, which he had since executed, and his counsel now claimed that he should be discharged.

*Mr. Henderson*, contra, objected to the defendant being liberated until the costs of his contempt were paid.

THE SECRETARY said the case of *Harris v. Meyers*, (1 Cham. R. 229) decided that a party could not be held in gaol for non-payment of costs. The sequestration might continue.

Order made for defendant's discharge. He was also ordered to pay costs, but not as a preliminary to his discharge, and on payment of them, sequestration to be discharged.

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**FRANKLIN v. BRADLEY.***Costs of interlocutory motion.*

Where a defendant had obeyed an order, and tendered a sufficient sum for the costs thereof, which the plaintiff's solicitor declined to accept, the defendant was given his costs of motion, less the sum tendered.

[September 14, 1869.]

*Mr. Morgan* moved on notice to commit the defendant for non-production of documents. The affidavit on production had been filed since notice was given, and the only question now was the costs.

*Mr. McDonald*, contra, said that before the motion was brought on he had tendered ten shillings in full of costs, and there was no necessity to make this application.

THE SECRETARY said that if the amount tendered was sufficient, he would give the defendant the costs of this application. It appeared that 6d. too much had been tendered, so the defendant was allowed his costs, less amount due at the time of the tender, 9s. 6d.

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**EVEREST v. BROOKS.***Service of bill.*

The mere fact of a defendant residing in England is not sufficient ground for dispensing with personal service of an office copy bill.

[September 15, 1869.]

An order was moved for service of the defendant in England, by mailing an office-copy to her address. It was shewn that the defendant resided permanently in England, and that the property was not worth the mortgage debt.

THE SECRETARY refused the order, on the ground that it was not shewn that there would be any difficulty in serving or identifying the defendant in England.

*Messrs. Patterson, Harrison, and Bain, Solicitors.*

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**WADDELL v. McGINTY.***Subpoena.*

A subpoena should be under the seal of the court, not that of a deputy registrar. Where a witness was served with a subpoena under the seal of a deputy registrar, it was held he was not bound to obey it.

[September 15, 1869.]

*Mr. Moss* moved for an order that Mr. Gooding should attend at his own expense, and be examined, he having failed to attend before a special examiner, although subpoenaed. The subpoena was produced, and was found to be not under the seal of the court, but under that of the deputy registrar at Goderich.

THE SECRETARY held that the witness was not bound to obey the subpoena, and refused the order.

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BROWN v. BURGAR.

*Service.*

Service on the agent of the solicitor who had acted in the cause for defendant, was held good service, although the solicitor had been changed, but no order for changing the solicitor had been taken out.

[September 17, 1869.]

*Mr. F. W. Kingstone* moved for payment out of court of the sum of four hundred dollars and interest, paid in in lieu of security for costs.

Messrs. McLennan & Henderson had been served as agents for defendant's solicitor, but the solicitor had been changed. No order had been taken out for the change, and it appeared that a decree had been made in plaintiff's favor.

THE SECRETARY granted the order.

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O'DEA v. SINNOTT.

*Motion for compensation.*

A motion for compensation for want of possession in a specific performance suit should be made in court and not in chambers.

[September 21, 1869.]

*Mr. A. Hoskin* moved, on behalf of the defendant, for an order giving him four hundred dollars for compensation for loss of possession of the premises, or for a reference as to the amount that should be given. The bill was for specific performance, and the decree directed an inquiry as to whether plaintiff could make a good title. The decree on further directions had been taken, but counsel had agreed that that should not bar any application for compensation, if properly made.

*Mr. Cooper*, for plaintiff, objected that the motion was a court motion, and could not be heard in chambers, and cited *Shinners v. Miller*, 1 Cham. Rep. 112.

The motion was enlarged to be heard in court.

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RE GEDDES & WILSON, SOLICITORS.

*Taxation—Attendance in Master's office.*

No bargain between a solicitor and client whereby the latter undertakes to pay more than the recognized fees for the work to be done, can be enforced.

Where a solicitor's Toronto agent made a bargain with the client for two dollars an hour, such bargain was held not to be binding, although looked upon to be reasonable, the sufficiency or insufficiency of the amount not being held to affect the question where the item is fixed by tariff.

[September 28, October 26, 1869.]

*Mr. S. H. Blake* moved on petition to open up a taxation which had taken place of certain bills of costs.

It appeared that the solicitor's agent in Toronto had made an agreement with the client, that he, the agent, should be allowed two dollars an hour for attendance in the master's office, and the agent had been allowed that sum, as between himself and his principals, on settlement of their account; but when they taxed their bills against their clients, the master disallowed one dollar of each two dollars so charged.

*Mr. Blake* read a letter from the solicitor, requesting the defendant to allow the items so struck off, and his refusal, also an affidavit shewing the agreement to pay the two dollars per hour.

*Mowat*, V. C., [before whom the matter was heard].—Do you consider that a valid agreement? I am inclined to think it is not. I take it to be law that you cannot get more than the tariff.

*Mr. Blake*.—That is between party and party.

**THE VICE CHANCELLOR.**—I consider it equally applicable between solicitor and client, except as to counsel fees, the allowing of which has grown into a practice.

*Mr. Blake* continued his argument, contending [that the client was bound by such an agreement, if as in this case, it was made fairly and without misrepresentation. Here the agreement was not with the solicitor, and no undue influence could have been exercised, but was made with Mr. Snelling, the agent in town, a stranger to the defendant until the occasion of his being called on by him on this subject.

*Mr. Hoskin*, contra, contended that there was no practice to warrant the present application. If dissatisfied, they should have appealed from the master's report or certificate, but the other side here, wait until they have availed themselves of the process of the court to collect all they can, and then come on the present application and ask for more. The solicitors were present at the taxation, and ought to have been aware of the circumstances of their own case. He submitted whether the ten shillings could, under any circumstances, be allowed at all, and pointed out that in agreeing with the client, Mr. Snelling was in effect representing the solicitors, and could be in no better position than they would have been had the bargain been with them.

**THE VICE CHANCELLOR.**—Might he not have been employed as counsel?

*Mr. Hoskin*.—The fact of his being paid by the hour shews he was not acting as counsel.

*Chisholm v. Barnhart* (10 Grant, 479), and *Re Wilson & Hector, Thompson v. Milligan* (13 Grant, 104) were referred to in the course of the argument.

**MOWAT, V. C.**—This is a petition by two solicitors, partners, praying that a certain taxation of costs between them and their clients may be opened. On the 8th May last, the solicitors obtained on petition an order for taxation and payment of their bill of costs. The costs were taxed by them on the 23rd June, and have, as I understand, since been realised by execution. The present petition alleges that the petitioners had employed Mr. Snelling as their Toronto agent; and that to save time the clients had communicated with him directly; that certain attendances

charged in the bill at two dollars an hour were allowed at one dollar an hour only ; that letters from Mr. Snelling to the clients were disallowed for want of proof ; that Mr. Snelling left Canada for Europe a few days before the return of the warrant to tax, and did not return until some day near the end of the long vacation ; that there was a special agreement between him and the clients for the charge of two dollars an hour, and that the petitioners were not aware of this until after his return. This agreement was verbal. Mr. Snelling deposes, that he attended the master's office on the 4th and 5th November, and charged five shillings an hour (which he was to share with his principals) ; that on the 12th November, the case of the defendants was to be proceeded with ; that he was engaged with Irving, one of the clients, for several hours on the 11th, and again the following morning, preparing the defence ; that he told Irving on the 12th, that he would not attend in the master's office during the examination of witnesses at two shillings and sixpence an hour, which was his share of the fee allowed, he being agent ; that unless Irving was prepared to pay him ten shillings an hour, out of which he, Mr. Snelling, would only get five, he would not attend ; and he further (candidly and properly) informed Irving, that, if he gave ten shillings an hour, he could not tax against the opposite party more than five shillings an hour, and that therefore five shillings of the amount would be paid out of his (the client's) own pocket. Irving then agreed to be charged ten shillings an hour ; out of which Mr. Snelling states that he was to receive five shillings an hour, and his principal five ; and his account has been paid by them accordingly.

It is to be observed, that the case is not one in which the master, in the exercise of the discretion given to him by the tariff, has thought fit to allow ten shillings an hour, and has noted the fact in his book ; the claim set up is, that, by virtue of the agreement, the charge is a proper one against the client whatever the master thought of it. It is quite clear that such an agreement was not legal or binding. No bargain between a solicitor and client, whereby the latter

undertakes to pay more than the recognized fees for the work to be done can be enforced. The client may pay more if he likes, and the payment may not, under the circumstances, be liable to be recalled; but if he only promise to pay, the promise is a *nudum pactum*. If such promises were valid as to one class of items, they must be valid also as to any and every other class; and the result would be, that a solicitor might make any bargain for compensation to which his client could be induced to agree. The validity of the agreement in the present instance was stoutly contended for by the learned counsel for the petitioners; but to yield to his argument, would, beyond all doubt, be to violate the policy and practice of the law of England, which are also on this point the policy and practice of the law of Ontario. I need hardly say that no case in support of the contention was cited. On the other hand, the reverse has been often held. Thus in *O'Brien v. Lewis* (9 Jur. N. S. 321) the Chancellor observed: "The law treated the relation between solicitor and client in a peculiar manner. It had laid down certain rules and scales of charges by which the services of a solicitor were to be remunerated, and it is imperative on the solicitor not to bargain, or permit his client to promise, that any additional benefit should be given beyond the legal remuneration." In *Re Newman* (30 Beav. 196), and other cases, (see *Re Ingle* 21 Beav. 275), it has been held that an agreement to pay one fixed sum in lieu of future costs, is not binding on the client (though an agreement to accept such a sum is binding on the solicitor); and in *Pierce v. Beattie* (11 W. R. 979; see also *Strange v. Brennan*, 15 Sim. 346) it was held that a commission of five per cent on money recovered, which a client had agreed to pay in addition to costs, was not recoverable.

But it was argued, as I understood the learned counsel for the solicitors, that the tariffs which have from time to time been promulgated by the court, are as between party and party only, and are not binding as between solicitor and client. But surely, that these tariffs have been in the main binding as between solicitor and client, nobody can ever have

doubted ; for it is according to these tariffs and no other, that all such taxations have always proceeded ; and without them the masters would have had no guide in any taxation of that character. Business may be done as between solicitor and client for which the tariffs made no provision ; but, for business which the tariff does specify, it is binding for all purposes, with, I believe, the single exception of counsel fees, an exception which was made very early in the history of the court, and has ever since been recognised. Reference was made to a case in which VanKoughnet, C., held that a retainer of £5, which had been actually paid by executors to their solicitor in an administration suit was allowable to them in their accounts, as a disbursement : *Chisholm v. Barnhart* (10 Grant, 479). But, however that may be, it is quite clear that an unpaid retainer cannot be taxed by a solicitor against the client. My brother Spragge informs me that he has frequently disallowed such a charge ; and there are reported cases to the same effect : *Cullen v. Cullen* (2 Cham. Rep. 94); *Re McBride* (1b. 158). It is quite certain that such is the rule in England.

From what Mr. Snelling says, I have little doubt that the increased fee for himself for which he stipulated was extremely reasonable ; but, where a fee is regulated by tariff, the question of its sufficiency or insufficiency cannot be considered on taxation. The client is not allowed to shew that it is too large, nor the solicitor to shew that it is too small, for the work done. It is further to be observed that a solicitor who in the middle of a case demands extra fees as the price of his continued services, has his client very much at his mercy. Such a case is in principle like those cases in which it has been held at law, that a promise made on an emergency to the crew of a vessel, of an addition to their stipulated wages, as an inducement to extra exertion, cannot be enforced : *Harris v. Watson* (Peake 102); *Stilk v. Myrick* (2 Camp. 317; 6 Esp. 129); *Bracewell v. Williams* (L. R. 2 C.P. 196).

As to the disallowed letters, the amount claimed for these is not stated. I see no reason for believing that by means of Mr. Snelling's letter-books and dockets, and other means,

these letters might not have been proved in his absence; but the solicitors elected by their agent to complete the taxation and take the master's certificate without taking or asking for time to prove the letters. I think no case has been established for opening the taxation as to the letters, the petition failing as to the extra charge for the attendances.

The result is that the petition must be dismissed; and I cannot refuse the respondents the cost of it.

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#### ALLAN v. O'NEAL.

*Arbitration—Making an award an order of court.*

An award made in pursuance of a reference by the court, will be treated as a judicial act, and made an order of this court as a matter of course. It is not necessary to wait until after a term before moving to make it an order of court.

[September, 1869.]

*Mr. Morphy*, moved to make an award made by the Secretary to whom the matter had been referred an order of this court.

*Mr. J. Hoskin*, contra, contended that the motion was premature, they were entitled to a term to move against the award.

THE SECRETARY, considered such a practice did not extend to an award made in a suit which could at once be made an order of court.

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#### WHITE v. KIRBY.

*Arbitration—Making award a rule of court—Appointment of an umpire.*

Where under a submission it was provided that arbitrators should appoint an umpire in case of disagreement, their appointing such an umpire was held sufficient evidence of their having disagreed without any allegation of that fact on affidavit.

An application to make an award a rule of court can properly be made in chambers on notice.

[October, 1869.]

*Mr. S. H. Blake* moved on notice to make an award

made on a submission in this case a rule of court : *Allan v. O'Neal*, reported in this volume, was cited.

*Mr. Ferguson*, contra, argued that an umpire had been appointed, and the submission only provided for such an appointment in case of a disagreement between the arbitrators, that therefore such disagreement should be shewn by affidavits ; also that the motion was not properly a chamber notice.

THE SECRETARY, held the disagreement sufficiently shewn, and the notice properly made in chambers on notice.

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#### SWINARTON V. SWINARTON.

##### *Interim alimony—Notice.*

An application for *interim alimony* must be upon notice.

[October 1, 1869.]

*Mr. T. Murphy* moved *ex parte* for an order for *interim alimony*.

THE SECRETARY refused the order because made *ex parte*. Such an order ought he said to be made on notice.

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#### B LONG V. KENNEDY.

##### *Affidavit of non-payment.*

The affidavit of non-payment of the mortgage money in a suit for foreclosure or sale should not be made on the day the money is due, but subsequently.

[October 8, 1869.]

*Mr. A. Chadwick* moved for final order for sale. The affidavit in support of the motion was made on the day on which payment of the mortgage money found due should have been made.

THE SECRETARY ordered that a new affidavit should be made before the application could be granted.

## NELSON v. GRAY.

*Master—Books and papers, &c.—Jurisdiction.*

The master has jurisdiction in matters in his own office and will not be interfered with on a motion in chambers. An order to be directed to him to deliver up books &c., in his hands was refused.

[October 9, 1869.]

*Mr. J. D. Edgar* moved on behalf of the receiver for an order directing the master to deliver up to the receiver the books of the estate, to enable him to make up the out-standing accounts and collect them.

THE SECRETARY inquired if the books had been brought in by the master's direction, and finding that they had, remarked: The reason given for making this motion is that the master refuses to allow his books to go out of his office. *Henna v. Dunn* (6 Mad. 340), shews that this is a matter for the master.

*Application refused.*

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LACHLAN v. REYNOLDS.

## MONK v. WADDELL.

*Hearing chambers motion before a judge.*

When a party moving desires to have his application heard before a judge, it does not entitle him to have it heard at a future day, but it may be heard at once.

The court will not encourage the hearing of motions before a judge, where the object of doing so is obviously to gain time after it has been refused by the secretary.

[October 15, 1869.]

*Mr. Downey* in the first of these cases, applied for a further enlargement.

*Mr. Holmested*, contra.

THE SECRETARY having granted previous enlargements and considering no sufficient grounds for enlargement shewn refused to grant it.

*Mr. Downey* applied to have the matter heard before a judge.

*Mr. Moss*, in the latter case, moved to dismiss the bill for want of prosecution. Mr. Downey asked an enlargement which was refused, and he applied to have this matter also heard before a judge.

THE SECRETARY, on consultation with *Mowat*, V. C., directed the motions to be heard before the judge on the same day that they had been mentioned before himself.

*Mr. Downey* objected, contending that the order must be considered to mean that the matter should be adjourned to some future day.

The objection was overruled and the motions heard the same day before the Vice Chancellor.

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#### CAYLEY v. COLBERT.

*Confirming sale under a decree notwithstanding an irregularity.*

Where an irregularity had occurred in advertising a sale, but no injury had thereby accrued, and a fair price had been obtained, the court confirmed the sale.

[October 22, 1869.]

A motion was made to confirm a sale. It appeared that the advertisement had been discontinued by mistake before the day of sale, and did not appear the number of times directed by the master. Affidavits were read, shewing that a fair price had been obtained, and the master approved of the sale.

*Mr. Hoskin* for infant defendants.

THE SECRETARY granted an order confirming the sale.

[See following case.]

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## THOMAS v. McCRAE.

*Confirming sale under a decree notwithstanding an irregularity.*

The secretary in chambers will not entertain a motion to confirm a sale where an irregularity has incurred unless the sale has been approved of by the master.

*Mr. Chadwick* moved for an order confirming a sale notwithstanding that a mistake had been made in the newspaper advertisement in stating that the sale would take place an hour later than the time fixed by the master and named in the posters.

*Mr. Ridout*, for the purchaser.

The master had refused to approve of the sale.

THE SECRETARY said the motion was in effect an appeal from the master, and could not be heard in chambers.

*Order refused.*

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## SMITH v. DEY.

*Security for costs, waiver.*

Security for costs must be applied for before the time for answering has expired.

The filing of an answer is a waiver of any claim for security for costs.

[October 28, 1869.]

*Mr. Foster* moved for an order for security for costs.

An answer had been filed and it appeared that the defendant must have known of plaintiff's residence out of the jurisdiction when he filed it.

*Mr. Moss* resisted the motion on the grounds that defendant had waived his right to security for costs by answering, the only reason he contended that was shewn for taking this case out of the ordinary rule was that an order for an injunction had been granted, providing that the defendant should file his answer at once, and that such filing should be without prejudice to any application for security

for costs, which defendant might be advised to make; but it was not intended that that should give the defendant leave to apply for security for costs after the time for answering had expired.

*Mr. Foster*, in reply.—The plaintiff mis-stated his residence in the bill, had he stated it correctly the order for security for costs could have been obtained on *præcipe*. *Swanszy v. Swanszy*, 4 K. & J. 237, was an authority to shew that where plaintiff misled the defendant the filing an answer was not a waiver.

THE SECRETARY refused the order for security for costs, on the ground that the defendant had waived his right to the order by filing his answer.

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RE FRASER.—FRASER V. FRASER.

*Administration suit, misnomer—amendments—Frivolous objection.*

The court will allow an amendment where an unimportant mistake has been made in a name which has misled no one, and the right person been served.

The court does not favor objections of this nature, and refused an enlargement; where, but for such mistake, the proceedings were regular and ample notice had been given.

[October 25, 1869.]

*Mr. S. H. Blake* moved for administration order of the estate of the late Daniel Drummond Fraser, of South Fredericksburg.

*Mr. Moss*, contra, submitted that the wrong person had been served as executor. The person for whom he appeared made affidavit that he knows no such person as Daniel Drummond Fraser, and never took out probate to the will of any such person.

*Mr. Blake*, in reply, pointed out that an error had been made in styling the estate that of Daniel Drummond Fraser, it should have been Daniel D. Fraser, the D. being only an

initial distinction. The executor Andrew Drummond Fraser was the son of Daniel D. Fraser, and well knew who was meant, the right person had been served, the mistake was merely in the name.

THE SECRETARY.—The error is one which the court would allow to be amended at the hearing, if it had occurred in a bill, so I allow the motion to proceed.

*Mr. Moss* asked for an enlargement to answer the proceedings when amended.

THE SECRETARY.—The court would not, I think, order the case to stand under such circumstances, but would allow it to proceed. The defendant has not been misled or taken by surprise, he has had ever since the 8th, and it is now the 28th. He should not have relied on such an objection as that made.

The motion was proceeded with, and the order asked for granted.

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#### ONTARIO BANK v. CAMPBELL.

##### *Dismissing bill.*

A bill can not be dismissed even by consent after a decree has been made in the cause.

[October 28, 1868.]

*Mr. Morphy* moved for an order to dismiss the bill in the cause by consent.

THE SECRETARY said, the order could not be made, as a decree had been made in the cause.

**PATRICK v. ROSS.***Advertising.*

Where by an oversight an advertisement had been inserted only three times instead of four, on an application for an order *pro confesso*, it was ordered that defendant be re-advertised the proper number of times.

[October 29, 1869.]

This was a motion for an order *pro confesso*, where the defendant had been served by advertisement. It appeared that the advertisement had been inserted only three times instead of four.

Order made to re-advertise.

*Messrs. Crooks, Kingsmill, and Cattanach, solicitors.*

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**POOLE v. POOLE.***Next friend—Security for, costs.*

A next friend is liable for costs incurred while acting as such next friend, and not for other or past costs.

Where a next friend had been appointed who proved to be an infant, and a new next friend was consequently appointed, an application to make the new next friend liable for the costs incurred before his appointment was refused.

[October, 1869.]

*Mr. J. A. Boyd* moved on behalf of Caleb Poole that the next friend do pay or give security for certain costs incurred by a former next friend, whose appointment had been cancelled on account of his being an infant; or, in default, that the bill be dismissed and the injunction granted dissolved. These costs had been ordered to be paid by the plaintiff by an order made 29th June last.

*Mr. Hodgins*, contra, contended that the defendant had elected by taking the order in the shape in which it was, to look to the plaintiff for his costs.

Further, that a motion of this kind could not be made in chambers, as it sought in effect to rescind a former order, the proper course was to appeal from that order. The prac-

tice he urged was not that the new next friend was liable for the costs before his appointment, the former next friend was liable for them. He referred to *Payne v. Lavel*, 16 Beav. 563. The answer had been filed, and the defendant had submitted to an order to produce and thus waived his right to security.

*Mr. Boyd*, in reply.—It was intended the defendant should have these costs, the order that plaintiff should pay them only shewed that she was liable as well as the next friend, the latter being primarily liable. The order formerly taken out, changing the next friend, should have provided that the first next friend should give security for the costs already incurred. Such order had been drawn up at the instance of the plaintiff, and no notice of settling it given to the defendant. He cited *Smith v. Etches*, 9 Law Times, 476; and also *Morgan & Davy on Costs*, 257.

**THE SECRETARY.**—I can make no order for security for past costs. The old next friend was an infant, and therefore the change was made. The order may be amended by making the next friend pay. The next friend was liable for all costs.

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#### DUDLEY v. BERCY.

*Further directions—Chambers orders—Appeals from the secretary.*

An order made by a judge on an appeal from the secretary, is a chamber order, and if costs or further directions are reserved, they should be disposed of before a judge in chambers, and the order made thereon, entitled, In Chambers.

Where, therefore, in such a case the cause was set down and in the list of causes to be heard on further directions, it was held to be improperly set down, and the costs of the day given against the party setting it down.

[November 8, 1869.]

*Mr. Ferguson* for the plaintiff, had set down the cause to be heard on further directions in court.

*Mr. Snelling*, contra, objected that it was improperly set down, that it was a chamber order made by a judge on ap-

peal from the secretary, and as such should be heard in chambers and not in court. This appeared from the reports of the former motion on which this order was made. See this case, 2 Cham. Rep. 364, 366.

*Mr. Ferguson*, contra : The order is not entitled, In Chambers.

*Mr. Snelling*.—It should have been so entitled, and the omission does not change the character of the order : it was entered in the order book in chambers. He referred to a case before the Chancellor, in which it was held that such an order was a chambers order, and the practice had since been universally followed, and indeed not before questioned.

**SPRAGGE**, V. C., held the order to be a chambers order, and the cause improperly set down before the court. On the costs of the day being asked, Mr. Ferguson contended that the point was an undecided one, and the order now to be made might properly be without costs.

*Mr. Snelling* urged that he had had to pay full taxed costs on a former motion in the same cause, and costs of the day were given him in the present case.

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#### BROOKE v. NIMEAS.

*Service of office-copy bill.*

Under peculiar circumstances accounting for the delay, service of an office-copy will be allowed although the time limited by the orders for service (twelve weeks) has elapsed.

[November 4, 1869.]

*Mr. McDonald* moved for the allowance of service after the expiration of twelve weeks since the bill was filed.

The affidavits shewed that a number of attempts had been made to serve the defendant, which were, however evaded. The defendant had not been seen at home since June last. His wife was eventually served at the dwelling place of the

defendant in September. An appointment was taken out for her examination in order to discover the husband's whereabouts; but she refused to attend, and refused to disclose his present residence.

Order made allowing the service, notwithstanding the lapse of time since filing the bill.

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### TOTTEN v. MCINTYRE.

*Ex parte motion.*

The court will not grant an order on an *ex parte* application, unless the practice distinctly authorizes it. On an application for payment out of redemption money in court, the application was refused.

[November 5, 1869.]

This was an application for an order to the registrar, to countersign the cheque for payment out of the money paid in to redeem the mortgaged premises.

THE SECRETARY.—I refuse to make the order *ex parte*, a question may be raised as to the deed of re-conveyance.

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### BRIGHAM v. SMITH.

*Solicitor and client—Solicitor—Costs—Proving claim before a master.*

Where a solicitor adopts a course which is obviously unreasonable and perverse, the court will order him to pay the costs occasioned by such conduct. Where, therefore, a solicitor refused to leave with the master a mortgage under which he claimed on behalf of a creditor, and the master disallowed the claim as not being proved, the court on appeal refused to interfere with the master's finding, and made an order for costs against both the solicitor and client.

Under the circumstances above stated, the court gave the client the creditor, a further opportunity of proving his claim, unless the solicitor should shew that he acted under express instructions.

[November, 1869.]

This was an appeal from the master at Ottawa, and the questions of practice stated in the head-note arose.

*Mr. Boyd* appeared for the appellant.

*Mr. S. H. Blake* and *Mr. Fitzgerald* for the other parties interested.

The facts sufficiently appear in the following judgment:

**SPRAGGE, V. C.**—From Mr. Boyd's opening it appears that the creditor carried his claim into the master's office, stating that he claimed for a debt secured by a mortgage. Upon the hearing of the claim the mortgage was produced and marked by the master as an exhibit, and returned to the hands of Mr. Ward, the solicitor for the creditor. In the course of the proceeding the solicitors interested in resisting the creditor's claim, desired to see the mortgage, and the master held that they were entitled to this, and directed Mr. Ward to hand it in. Mr. Ward refused to hand in the mortgage for any other purpose than its inspection by the master, the solicitor for the other parties not to be allowed to see it. The master insisted upon the mortgage being put in, and Mr. Ward persisted in his refusal; and upon this the master held that there was no evidence before him in proof of the debt, and disallowed the creditor's claim.

My opinion is, that he could not do otherwise. I do not agree that his proper course was to compel the creditor by process of the court to bring in the mortgage. If it were a document required for the case of an opposite party, that would have been proper; but to take such a course where the document withheld is a piece of evidence in favor of the party withholding it, it would be taking steps to compel a party to prove his own case. It is for him to prove it or not, as he thinks fit. In case of his failing to do so, the proper consequence is, its disallowance.

The course taken by Mr. Ward appears to me quite unaccountable, and so unreasonable, and so opposed to the recognized course of proceeding that it seems, unexplained, nothing less than perverse. The appeal must be dismissed, and of course with costs; and I must add that the proper person to pay these costs seems to me to be Mr. Ward. The

opposite parties are, however, entitled to enforce them against Mr. Ward's client, and I cannot exempt him. The order will be against both, unless Mr. Ward shews, by affidavit to be filed promptly, that he took the course he did by the express direction of his client, or that he had some good reason for his course. If the course taken by Mr. Ward was not the act of the client, I will allow him another opportunity of proving his debt. He may have a just debt, and I should be sorry to punish him for the error of his solicitor. I will allow him three weeks for that purpose, and the costs of this appeal must in the first place be paid.

On a subsequent day Mr. Ward filed an affidavit, and the Vice Chancellor added to his judgment the following note:

SPRAGGE, V. C.—Mr. Ward puts in an affidavit to exonerate himself from the charge of acting vexatiously. It seems reduced to an error of judgment, though a strange one. I will relieve him therefore from the personal order.

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#### MCINTYRE v. CANADA COMPANY.

*Postponing hearing, after order limiting time.*

Where a commission to take evidence abroad could not be executed in time, by reason of the illness of the commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing.

The plaintiff, having failed to proceed to an examination of witnesses at the last spring sittings at Belleville, an order was made in June last, that he proceed to examination and hearing at the then next ensuing sittings, in default of which his bill was ordered to be dismissed. Soon afterwards the plaintiff obtained an order for a commission to take evidence in Ireland, and the commission duly issued accordingly, in time to allow of its being returned before the ensuing sittings. But owing to the illness of the commissioner it was not executed at the time appointed, in conse-

quence of which it could not possibly be executed in time to be used at the next sittings.

*Mr. McGregor* applied, on notice, for further time, on the ground that the commission failed through no default of the plaintiff, and that he could not be prepared to proceed at the ensuing term.

*Mr. Hodgins*, contra, objected that the plaintiff might have proceeded before, and asked that if the plaintiff were allowed further time, it should be only on payment of costs.

THE SECRETARY, after considering the matter directed that the plaintiff should be allowed to proceed at the next spring term, and that the costs occasioned by the failure of the commission and of the application, be reserved to the hearing of the cause.

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#### COLLINS v. DENISON.

*Irregularities in foreclosure proceedings—Parties to an application.*

A purchase from a party in whose favor the court has decreed final foreclosure has a right to presume that the court has taken the necessary steps to investigate the right of the parties, and has on that investigation properly decreed foreclosure. The court will not set aside a foreclosure after the estate has been acquired by a *bona fide* purchaser for value on account of a slight irregularity in one of the papers on which the order for foreclosure was granted. Where, therefore, a party who was a second mortgagee and had been solicitor for the plaintiff, purchased the estate from one who had, for so long as appeared, purchased in good faith for value of the plaintiff without notice of any irregularity, and the order for foreclosure was set aside by the secretary on account of the absence of a date in the bank manager's certificate; an application by the purchaser from the plaintiff, in which the subsequent purchaser joined to set aside the secretary's order was granted with costs.

It was held that the joining in such application by the subsequent purchaser, was not irregular but surplusage at most. The defendant having, as it was alleged, sold his interest or equity of redemption to a third party, who was notified of this application, it was held that it was not necessary to notify the defendant, as the purchaser from him had been notified.

[November, 1869.]

*Mr. J. A. Boyd* moved to rescind an order of the secretary made under the circumstances stated below.

*Mr. McLennan*, contra, took a preliminary objection that the defendant Denison had not notice of the present motion.

*Mr. Boyd*.—It is not necessary that Mr. Denison should be represented. Mr. Crowther, who, it is alleged, is purchaser of the equity of redemption, or Mr. Denison's interest, and in whose name the suit has been revived, is represented here.

THE VICE CHANCELLOR allowed the argument to proceed subject to the objection, and disposed of it in his judgment—overruling it—observing that he did not see that it was necessary to revive the suit. An amendment alleging the change of interest was all that was necessary.

The facts appeared to be as follows:—Collins being a mortgagee of the premises in question, on the 11th June obtained a final order of foreclosure. On the 18th June he sold the premises to one McDonald. On the 26th June, defendant Denison moved to set aside the final order, on the ground of irregularity, that the bank manager's certificate contained no date. On the 26th August the secretary granted the application, and set aside the final order of foreclosure. This order was duly entered and taken out on the 23rd October. On the 20th October McDonald sold to a purchaser, with notice of the irregularity, who created a mortgage on the premises.

The application is now made by the purchaser and mortgagee to rescind the secretary's order setting aside the final order of foreclosure.

*Mr. Boyd*, in support of his motion, contended that the court had nothing to do with the relation which existed between the purchaser from McDonald and Collins. It was clear that McDonald was not affected with notice, and although the purchaser was, yet, as he stood in the place of McDonald, he was sheltered. The decision in *Gunn v. Doble*, 15 Grant, 653, shewed that a purchaser from a mortgagee without notice had only to look at the final order of foreclosure. If, on the face of it, it was correct, he was

not affected by irregularities in taking it out, consequently McDonald was unaffected and his purchaser also.

*Mr. Boyd* also contended that the secretary had no power to set aside the final order in the absence of the purchaser.

*Mr. McLennan* contended that McDonald's purchaser being affected with notice he could not be sheltered by McDonald's want of notice. He also contended that the purchaser was in fact the owner of Mr. Collins's mortgage, and that the whole proceedings were manipulated to suit the purchaser. It was alleged that Collins, McDonald, and the purchaser, were bosom friends, and the matter was arranged to take advantage of Denison.

**SPRAGGE, V. C.**—The affidavits, depositions, and other papers and proceedings are numerous and voluminous; but the question after all lies in a very small compass.

The plaintiff obtained his final order of foreclosure on 11th June, 1869, and on the 18th of the same month he sold and conveyed to McDonald: a doubt is suggested whether this conveyance is not antedated, but it will be presumed to bear its true date unless the contrary be shewn; and besides all the evidence is that it was executed at that date. The consideration consisted partly of land conveyed by McDonald to the plaintiff, and partly of cash for which a promissory note was given. McDonald then was not a volunteer and he proves that he purchased on his own behalf; and that the land which he conveyed to the plaintiff was his own land. On the 20th of October he sold and conveyed to Donovan. Between McDonald's purchase and his sale to Donovan the final order of foreclosure was set aside for irregularity, the irregularity being the absence of a date to the bank certificate. This order is dated 24th August, 1869, and was entered on the 23rd of October following. On the 26th August the plaintiff, by his solicitor Donovan, took out an order appointing a new day, the 3rd September following, for the payment of the mortgage money and costs. On the 9th of the same month an order of

revivor was taken out, signed by the clerk of records and writs, adding James Crowther as a party defendant, as having acquired the equity of redemption. Further time was obtained for payment of the mortgage money. It was a struggle between the plaintiff by his solicitor to obtain a second order of foreclosure, and on the part of Crowther, or Denison, in his name to redeem by payment of the mortgage debt. Donovan the solicitor was himself a second mortgagee on a portion of the same premises. He was made a party in the master's office, but failed to come in and prove. He afterwards made an unsuccessful attempt to be allowed to redeem the plaintiff. An application to the secretary for this purpose was refused on the 5th of October; and the secretary's order was affirmed by my brother Mowat in appeal on the 18th of the same month; and two days afterwards Donovan purchased and received a conveyance from McDonald.

An application was made by the plaintiff to the secretary to rescind his order setting aside the final order of foreclosure; which he refused, and the plaintiff then applied to me by way of appeal from the secretary's order. I thought the plaintiff was concluded by his taking out an order appointing a new day, and his acquiescence thereby in the order; and refused the application.

This application is by McDonald, the purchaser from the plaintiff, and Donovan the purchaser from him. Donovan is of course entitled to stand in the shoes of McDonald; and to avail himself of any position that McDonald would be entitled to occupy, if he was still the purchaser, and had made no sale of the property. There is some evidence tending to shew that McDonald was the instrument of Donovan in making the purchase from the plaintiff, but though it may give room for suspicion it goes no further; and is positively denied in evidence.

Taking McDonald to be a *bona fide* purchaser on his own account, the principle upon which I proceeded in *Gunn v. Doble*, 15 Grant, 655, applies to this case. I found it established that a purchaser at a sale made under a decree of this

court has a right to presume that the court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale; and it appeared to me upon principle that a purchase, from a party in whose favour the court has decreed final foreclosure has the like right to presume that the court has taken the like steps ; and has upon investigation properly decreed final foreclosure ; that the purchaser is not bound to look into irregularities, not discovered by the court; and is entitled to stand upon the order of foreclosure which the court has passed as correct and regular.

Mr. Crowther has been reticent in regard to his position in this matter. Whether he has paid any consideration to Denison or is or was to pay any, whether in fact he is not a mere trustee for Denison, the court is not informed. If Denison had himself redeemed he would be still be bound to redeem the second mortgage. For aught that appears the transfer to Crowther may be a contrivance to cut out the second mortgage. There is perhaps quite as much reason to suspect such to be the case as to suspect that McDonald was not really a purchaser on his own account. However, what I go upon is that upon the evidence he appears to be a *bond fide* purchaser for value and is not affected by the irregularity, a very petty irregularity indeed—in one of the papers upon which the final order was founded. I ought to have noticed two preliminary objections taken by counsel in shewing cause against this application—one is that notice should have been given to Denison. I do not think that notice to him was necessary, inasmuch as according to the order of revivor he has conveyed the mortgaged premises to Crowther and has ceased to have any interest. The other is that McDonald and Donovan could not join in this application. It is substantially the application of Donovan, not indeed as second mortgagee but as purchaser after final foreclosure ; being subrogated to the rights of McDonald. At most its being joined in by McDonald is surplusage.

I think the order asked for must be granted with costs.

## PROCTER v. DALTON

*Noting pro con.—Deputy registrar.*

It is the proper practice for the deputy registrar to note the bill *pro confesso* where the bill has been served within the jurisdiction.

[November 7, 1869.]

*Mr. Kerr* moved for an order *pro confesso* against a married woman, who had been ordered to answer separately, but who had made default; he stated that he had applied to the deputy registrar at Cobourg, to note the bill *pro confesso*; but he declined, considering he had no jurisdiction.

THE SECRETARY said the Chancellor had expressly decided that the deputy registrar could so note the bill where the service had been affected within the jurisdiction.

## TYRON v. PEARS.

*Order 79.*

Order 79 applies only to copies order to amend, not to office-copies of bill.

[November 11, 1869.]

*Mr. Henderson* applied *ex parte* for an order dispensing with copies of amended bill on the defendant served with original bill, the amendment not affecting them in any way.

THE SECRETARY, observed that order 79 applied to copies order to amend not to office-copies of the bill and granted the order as to the order to amend only.

**McQUEEN v. MCQUEEN.**

*Master's report—Leave to appeal when time expired.*

Where a proper case was made explaining the delay, leave to appeal from the master's report was granted, although the time limited for appealing had expired. It is not necessary on such an application to shew the sufficiency of the grounds for appealing.

[November 18, 1869.]

*Mr. Ferguson* moved on notice for leave to appeal from the report of the master at Chatham, notwithstanding that the time for appealing had elapsed. The reason given for delay was that appellant's solicitor was under the impression from the statement of the master, that the questions on which appeal was sought were left open to be disposed of on further directions, he had also been misled by the report being dated 15th September, when it was not settled with until 3rd October.

*Mr. English*, contra, urged that a case for appeal should be made out before leave could be granted.

THE SECRETARY said that this was not necessary, it would be arguing the appeal before leave to appeal granted.

*Leave to appeal granted on payment of costs of application.*

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**GORDON v. ELLIOT.**

*Foreign commission.*

All examinations under foreign commission must be by interrogatories, unless otherwise arranged by consent.

[November 16, 1869.]

*Mr. Moss* moved for an order disallowing certain evidence taken under a commission at Saginaw, on the grounds amongst others that the order for the commission was irregular in directing the examination to be taken *viva voce*,

instead of by interrogatories, in the absence of any consent. He contended that the practice in such a case was the same as before the introduction of *viva voce* examinations before the judges which would be the same as the English practice as laid down in *Daniell's Ch. Practice*.

*Mr. S. H. Blake*, contra, contended that the ordinary practice in use for taking evidence here had been followed: and there was no analogy to the English practice. In England nearly all evidence was by interrogatories, and so it was proper that commissions should be so executed; here *viva voce* examinations was the rule, and the order was right in following the usual practice.

*Mr. Moss*, in reply.—It is not correct to say that the evidence in England is not taken *viva voce*: it is taken *viva voce* before examiners instead of before the judges, which is the only difference from our practice.

THE SECRETARY set aside the order on the ground that all foreign commission must be by interrogatories unless by consent.

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#### GRAHAM v. GODSON.

*Master's reports.*

A motion to refer a report back to the master will not be entertained in chambers, even on consent.

[November 18, 1869.]

*Mr. Henderson* moved for an order referring it back to the master to reconsider his report as to the amount due. It was stated that all parties consented.

THE SECRETARY refused the motion, as he had no jurisdiction to entertain it. It should, he considered, be made in court.

## BENTLY V. JACK.

*Master's reports.*

A motion to refer a report back to the master, will not be entertained in chambers, although the master certified that he had made a mistake.

[November 19, 1869.]

*Mr. J. A. Boyd* moved *ex parte* for an order to amend the report of the master at Belleville. He stated that the master desired the amendment as he had made a mistake, and read the certificate to that effect. The master had, it appeared, reported special circumstances in an account favourably to the plaintiff, when he should have reported them in favor of defendant, he having been misled by reading the words "rendered an account" as "demanded an account."

THE SECRETARY said he could make no order as the error was not one apparent on the face of the report. The application should be to the court.

## FERGUSON V. LANGTRY.

*Infants—Appointing guardian.*

When a *prima facie* case is made, shewing that no conflicting interests exist between the infants and the proposed guardian, or the party proposing him, the court will not go into the question of the fact or extent of interest.

[November 23, 1869.]

*Mr. Morgan* moved on notice for the appointment of a guardian *ad litem* to the infant children of Peter Ferguson, deceased, who had been made parties in the master's office.

*Mr. Blake* appeared for the infants, and asked that Mr. Barry, of Hamilton, who acted for the mother, should be appointed guardian.

*Mr. Morgan* opposed such appointment, alleging that the interests of the mother and the infants were conflicting.

The motion was enlarged for the purpose of affidavits being filed, shewing the fact as to interest; and, when on a subsequent day the motion was renewed on an affidavit that the interests of the mother and the infants were identical, a further enlargement to enable contradictory affidavits to be filed was refused, and the order appointing Mr. Barry granted.

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NICHOLLS V. MOORE.

*Admitting evidence after hearing.*

An application to take evidence after hearing should be by petition and in court, and an application made in chambers was dismissed with costs.

This was a cause which had been heard at Belleville, before His Honor, V. C. Mowat, at the last spring sittings. Judgment was pronounced immediately after the hearing; but no decree had ever been passed.

*Mr. McGregor* moved on notice for an order opening publication, and allowing the plaintiff to give further evidence. The evidence already taken on behalf of the respective parties to be evidence in the cause. He referred to *Small v. Eccles*, 2 Chambers Reports, 97.

*Mr. Hoskin*, contra, objected that the application should have been by petition, and made in court.

THE SECRETARY, after consulting the judge who heard the cause, held the objection good, and dismissed the motion with costs. He referred to *Mason v. Seney*, 12 Grant, 143, and 2 Chambers Reports, 30.

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## POOLE v. POOLE.

*Dismissing bill—Married woman.*

On a motion to dismiss the bill of a married woman the court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend. The court will not hold a plaintiff bound in every case to prepare for hearing before the defendant has made production under the order to produce, where that order has been taken with promptitude. Where, therefore, the defendant having anticipated the time for answering, and an insufficient affidavit on production was filed just in time to leave the plaintiff a single day before giving notice, supposing no amendments required, the court refused a motion to dismiss.

[November 23, December 24, 1869.]

This was a motion to dismiss the plaintiff's bill for want of prosecution, in which the secretary had granted an order.

*Mr. Hodgins*, for the plaintiff, appealed from the secretary's order.

*Mr. J. A. Boyd*, contra.

*Mowat, V. C.*—The question is, whether the defendant Caleb Poole is entitled to dismiss the plaintiff's bill.

The bill was filed on the 20th of May, 1869, by the plaintiff, a married woman, suing by her next friend. On the 28th of May the defendant, Caleb Poole, obtained an order for a stay of proceedings, on the ground that the next friend was insolvent, under age, and absent from the country. On the 11th of June the plaintiff obtained an order, on notice, from my brother Spragge, granting an injunction to stay a sale of land, on the plaintiff's giving security for the costs of the sale, and for certain extra interest, to the satisfaction of the master at Brantford, or upon payment of \$80 into court, if the plaintiff should prefer that alternative; and it was ordered that, in the event of the plaintiff's not giving the security, or paying the \$80, and appointing a proper new next friend, or giving security for the costs of the suit, within ten days, the defendant should be at liberty to move to dissolve the injunction. The time was afterwards enlarged, and the terms of the order were ultimately complied with. On the 29th of June, an

order was obtained substituting a new next friend. It was contended on the part of the defendant, Caleb Poole, that the delay up to that time should be taken into account against the plaintiff on the present motion. But I think that that would be dealing too hardly with a married woman who, when obliged to sue in this court, is not allowed to do so, as others are, without finding some one able and willing to be responsible for her conduct of the suit, and for any costs which she may be ordered to pay to the defendant. On the 17th of September the defendant filed his answer ; and on the 18th of October he served notice to dismiss for want of prosecution, under the first section of Consolidated Order No. 278. The plaintiff excuses her delay by asserting that she was in no default for not having got the case to a hearing at the October sittings in Brantford, and that the defendant had put in an insufficient affidavit under an order to produce. The defendant's answer was not due until the 28th of September, which day would have been too late for serving notice of hearing for the sittings ; but a notice on the 23rd of September would have been in time ; and the defendant, by anticipating by a few days the time for answering, had left to the plaintiff five clear days between the service of the answer and the day for giving notice. But I cannot say that a plaintiff is bound in every case to prepare for hearing before the defendant has made production under the order to produce, provided that order was taken and served with promptitude. Here, it was obtained and served on the day after the filing of the answer. On the 22nd, the affidavit on production was filed, leaving but one clear day for the plaintiff's solicitor to consider and take advice upon the sufficiency of the affidavit, the amendment of the bill, and the evidence required. If she were advised that the answer rendered amendment necessary, the defendant would have had seven days to answer the amendments (Consolidated Orders, No. 153) before the plaintiff could have replied ; and the seven days would not have expired until after the day had passed for serving notice of hearing. But the affidavit of the defendant admitted the

possession of "certain documents relating to the matters in question in this suit," which the defendant did not produce, and which he objected to produce. These documents are in part described by the defendant. If, as he admits, they refer to the matters in question in this case, the mere fact that they also refer to and are connected with another suit is obviously no reason for withholding them from the plaintiff's inspection. On the 24th of September the plaintiff's solicitor served notice demanding production of the documents thus kept back ; but the notice has not been complied with.

If I cannot say that the plaintiff was bound to take the case down for hearing at the October sittings, I think that, in the exercise of the discretion which belongs to the court on applications to dismiss, the bill should not be dismissed on the present motion. An affidavit has been filed stating that there has been no wilful or unnecessary delay by or on the part of the plaintiff in the conduct of this suit, and that, in the belief of the deponent, the plaintiff has a good case on the merits ; and I think that the facts in proof do not shew that there has been wilful or unnecessary delay.

The motion to dismiss will therefore be refused without costs.

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#### LAWRASON V. BUCKLEY.

*Infants—Proceedings taken after an infant has come of age.*

Proceedings which a defendant allows to be taken against him after he comes of age are binding on him.

There is no necessity for his being served with notice of the suit after his coming of age.

A motion to set aside such proceedings as irregular and void was refused with costs, but the defendant was allowed to take an order giving him leave to falsify any of the items in the costs taxed, and accounts allowed by the master, reserving the costs of reference.

[November 29, December 4, 1869.]

This was a motion to set aside all proceedings which had been taken in the cause since Theophilus Francis Buckley, the defendant moving, had come of age.

*Mr. Moss*, for the motion.

*Mr. McLennan*, contra.

MOWAT, V. C.—This was a motion on the part of one of the defendants, Theophilus Francis Buckley, to set aside all proceedings which have taken place since he came of age. The decree was made on the 17th of April, 1866. This defendant came of age in the following year, viz., on the 23rd of September, 1867. The defendant's costs were taxed in March, 1867, and no other proceedings took place after decree until the 12th of February, 1868. Since that date, various accounts have been taken, claims of creditors allowed, reports made, and other proceedings taken. The decree directed a sale of the property in case of non-payment to the creditors of a certain composition. This sale has not yet taken place, having been stayed at the plaintiff's instance.

It was argued for the motion that all proceedings after an infant comes of age are irregular and void, unless, after coming of age, he is served by the plaintiff with notice of the suit. But I find no authority for that position. It is quite clear that an infant's coming of age is no abatement of the suit; and it is laid down that "in such cases the course is, to proceed to hearing without any change in the proceedings:" (*Wyatt's Practice*, 225; *Cur's Case*, 464, cited 3 *Chit. Eq. Dig.*, 3rd ed., 1808, pl. 4). I have looked at the cases cited to me (*Davis v. Dowding*, 2 Keen, 248; *Morrison v. Morrison*, 4 M. & C. 216), as well as several others mentioned in Mr. *Daniell's* book (1 *Daniell's Practice*, 81, 82, 4th ed.), and they seem to support the plaintiff's proceedings. In *Davis v. Dowding* it appears to have been held expressly, that proceedings which a defendant allowed to be taken after he came of age were binding on him. The solicitor who acts for him during his minority continues his solicitor afterwards, until he procures an order discharging the solicitor (*Acres v. Little*, 7 Sim, 138; *Swift v. Grazebrook*, 13 Sim. 185); and all that I can find implies that the solicitor's proceedings until then are regular. (See

*Ballard v. White*; 4 Hare, 158; *Brown v. Brown*, 11 Beav. 562; &c.)

The evidence affords no room for doubting that, at and before the time this defendant came of age, he knew of the suit, was aware of its nature and object, was acquainted with the terms of the decree, and was aware the defendant's solicitor was acting therein for him and for all the other infant and adult defendants except one; that he never informed Mr. Meredith that he had come of age, nor intimated any desire that he should cease acting for him; and that Mr. Meredith, who was guardian *ad litem* as well as solicitor for all the minor defendants, was not aware that this defendant had come of age until he learned it from the affidavit filed by the defendant on the present motion. These facts, indeed, are not denied by the defendant. He merely swears that, until lately informed by his present solicitors, he "was ignorant of the position and proceedings of the suit," or "of the taking of the accounts, or of the amount found due, or whether any day or place had been appointed for payment;" but that, from the time of his coming of age, he knew, generally, of the suit being in progress in the master's office, and that he was aware of some of the proceedings after that time, he does not dispute. He complains that Mr. Meredith did not attend at the master's office at the return of some of the warrants; but Mr. Meredith explains that his non-attendance was deliberate, and was because attendance on the occasions referred to was not necessary in the interest of the defendants. The affidavits do not indicate that the defendants have been damnified by the non-attendance.

The defendant sets up an irregularity in the style of the cause as set forth in a report of the 26th of March, 1868, and in the form of that report. But if there is any authority for setting aside a report for such reasons, a motion for the purpose is too late when deferred for eighteen months after the report has been signed, and till long after several proceedings had been had on the faith of the report.

In accordance with the last alternative named in the defend-

ant's notice of motion, he may, if he chooses, take an order giving him leave to surcharge and falsify any of the items in the costs taxed and accounts allowed by the master, directing the master to report the result, and reserving the costs of the reference. In that case, the plaintiff, must have leave to shew those errors on the other side which are mentioned in his affidavits. In any event, the defendant should pay the costs of the present application; and his election to take the leave mentioned must be made, and the costs paid, within ten days: otherwise, the motion will be dismissed with costs.

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#### GALLAGHER V. GAIRDNER.

*Examining party or witness before special examiner, or master in the country.*

As a rule, a suitor has not a right to bring his opponent to Toronto, or elsewhere from his residence for the purpose of interlocutory examination, except upon special grounds. Where, therefore, an order had been made by the secretary for a plaintiff to attend before a special examiner at Toronto; the venue in the cause being laid at Goderich, and the parties residing there, and the plaintiff's solicitor residing there also, the solicitor for the examining defendant residing in Toronto; such order was rescinded upon the plaintiff refunding the conduct money paid him without costs, the defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as the right of examining parties.

The proper practice in a case where special grounds exist, is an application on notice in Chambers shewing such special grounds.

[December 8, 1869.]

*Mr. Bain* moved, on notice, to set aside an appointment to examine the plaintiff before Mr. Esten, special examiner, at Toronto, on the ground that as all parties resided at Goderich, it was improper to bring a party to Toronto to be examined. The affidavit of the plaintiff's solicitor was read, and proved that the parties lived at Goderich, and the plaintiff's solicitor also resided there. It also shewed that the plaintiff was willing to be examined at Goderich, but resisted being brought to Toronto. Mr. Bain then cited on this point *McDermid v. McDermid*, 2 Chancery Chambers

Reports, 332; also *Reed v. Prest*, Kay App, 14, *Brocas v. Lloyd*, 21 Beav. 518. It was also contended that the order was irregular, inasmuch as the full style was not used. The order as it stood was, "*James Gallagher v. Robert H. Gairdner and others*, by amended bill." without setting out the style in full.

Upon the authority of *Dickey v. Heron*, reported in this volume, decided by the late Chancellor, this objection was overruled.

It was also objected that the copy of the order served differed from the original.

*Mr. S. H. Blake*, contra, commented on the case of *Brocas v. Lloyd*, cited by Mr. Bain. He also urged upon the court the advantage of having examinations before the special examiner at Toronto. As to the power of the special examiner, he was in the habit of issuing the subpoenas of the court to any part of the province, and if he had that power he surely had the power to compel attendance. If another practice were introduced a great number of examinations would have to be taken before different examiners in different counties and towns and apart from the expense thus entailed, one of the chief objects of examining parties would be altogether lost, as the parties could make their examination tally, and one of the best tests for eliciting truth made unavailing. As to the costs of attending at Toronto the costs are reserved, and if it turns out that the appointment was taken out unnecessarily, the costs can be provided for in disposing of the question of costs at the hearing, which is the proper time to decide that question and the necessity for attendance. The expense complained of has to be borne by the plaintiff in the meantime. Any evil can be guarded by the court, and the court will not weigh the slight inconvenience of the examined party against the manifest advantage of arriving at a proper decision and having the evidence well taken. The defendant had been before notified to attend and had been paid the expenses of attending—these expenses he had retained and an order had been made for his attendance at his own expense.

*Mr. Blake* contended that the variations between the copy served and the original order were immaterial. He also contended that the plaintiff had by his delay in moving and conduct generally acquiesced in the right to examine him at Toronto.

*Mr. Bain* in reply, said that when first called on it was impossible, from the short notice given, for the plaintiff to attend. There had been no acquiescence ; on the other hand every struggle had been made against the order from the first. If the right of the special examiner existed, as claimed, it was liable to abuse, and the policy of the court should be against it. The argument that the evidence could be better taken here, presumed that the court had appointed incompetent masters in outer counties ; whereas, whilst the gentlemen where retained in office, the presumption was the other way.

SPRAGGE, V. C., said that two questions had to be disposed of—1st. The right or power of the special examiner, and 2nd. The policy of encouraging the exercise of such a jurisdiction, if it existed. He might dispose of the first at once; but as he would have to consult his brother judges on the other, he would reserve judgment. And on a subsequent day gave his judgment at length, in the following terms :

In this case as appears by affidavit the venue is laid at Goderich, the transaction in question in the suit took place for the most part in the county of Huron, the plaintiff resides in the same county about twelve miles from Goderich and two of the defendants, Robert H. Gairdner and James Gairdner reside in the same county. The solicitor for the plaintiff and for defendant Buchanan reside in Goderich. It is not suggested that the venue is not properly laid there. The question that has arisen is between the defendant Robert H. Gairdner and the plaintiff. That defendant has employed a solicitor residing in Toronto, as, of course, he had a perfect right to do. Desiring to examine the plaintiff before the hearing, he obtained from

Mr. Esten, one of the examiners of the court residing in Toronto, an appointment for his examination in Toronto, and subpoenaed the plaintiff to appear before Mr. Esten for examination. So far as appears, the sole reason for the examination taking place in Toronto was that the solicitor for the examining defendant resides in Toronto. The defendant therefore must stand upon his right to require the plaintiff to attend at Toronto to be examined; and he would have had the same right, if, instead of engaging the services of a solicitor residing at the chief seat of the court, he had chosen to employ one residing in Cornwall, or Ottawa, or Perth; or, to push the matter of strict right to its results, he might compel the plaintiff to attend before any examiner in the province he might choose to name, whether his solicitor resided at the same place or not. Such an extensive exercise of the right would be an abuse; and it might be apparent that it was dictated by improper motives. I need hardly say that in the case before me I am satisfied that the defendant's solicitor has not acted vexatiously, but as he judged best for the interests of his client. I have only pointed out some of the consequences of its being allowed to a party to examine an opposite party, at any place that he may choose to designate.

The plaintiff's solicitor in this case contends that it is not the right of a party to compel the attendance of another party, or of witnesses upon interlocutory examinations, at any place beyond 20 miles from their place of residence; and he refers to *Reed v. Prest* (1 Kay. App. xiv.) in support of his position. That case was since the 15 & 16 Vic. c. 86, and the application was to appoint an examiner for the oral examination of witnesses residing more than 20 miles from London. It was objected that some of the witnesses had been already examined in London and that there was no reason why the rest should not be so: but the present Lord Chancellor, then Vice Chancellor, held that the former practice was not altered by the statute in the case of witnesses residing more than 20 miles from London, and granted the order. But this case seems to be overruled: see *Brocas v. Lloyd* (21 Beav. 519,)

and the same case or a case of the same name (23 Beav. 129) upon an application to compel the attendance of a solicitor residing 155 miles from London, where the only question was as to the sufficiency of the conduct money, his liability to attend not being questioned, and Mr. Daniell, in his 4th ed. (Prac. p. 839) states the rule as to the 20 miles residence as no longer existing.

There is this great difference between the English practice and ours that in England there are no examiners in the country; and Lord Romilly thought it better to bring witnesses to London, than that the expense, which he designated as enormous, of appointing special examiners, should be incurred. Our machinery for the hearing and determining questions, not of fact only but of law, is so essentially different from that of England, that the practice in the English court, cannot be cited as applicable in ours, we have, what Lord Romilly pointed out as perhaps desirable in England—special examiners in the country; and, in short, our whole system of the administration of equity is based in a very large measure upon the principle of decentralization; and it is a principle not only that there is not as in England, one place for the administration of equity; but that no suitor has an absolute right to fix the place for the taking of his evidence: I refer to our practice as to change of venue. That practice, and the practice as to the locality of references, proceed upon the principle that the court recognizes no absolute right in any suitor to say where the evidence shall be taken in his suit, or before what officer of the court any enquiries proper in the suit shall be conducted; but acts always with a due regard to the interests of all parties.

Suitors are, it appears to me, bound to act in accordance with these principles; and the court should not lend its aid to any proceeding that contravenes them.

To apply what I have said to this case: a plaintiff lives near Goderich, and has his books and papers there; he has laid his venue there, and properly it would seem; all the witnesses are to be examined there, and any *parties* that may be examined at the hearing are also to be examined there.

His solicitor resides there, the pleadings are filed there ; and all books and papers produced are in the office there, the defendant, who desires to examine him, resides there or near there. The one thing not there, is the residence of the solicitor whom that defendant employs. That circumstance has no weight in questions of venue ; and if it be urged that if the plaintiff is not brought to Toronto, it would be necessary in the interest of the defendant that his solicitor should go to Goderich, it might well be answered that it would be necessary for the interest of the plaintiff if called to Toronto, that his solicitor should be with him there, so that the balance of convenience would be in favor of an examination in Goderich ; and there is also the advantage of the books and papers being there.

Upon what is before me, there is then, nothing in favor of the examination of the plaintiff being at Toronto, ; but the will of the examining defendant that it should be so. There are against it the circumstances to which I have referred, and the principles upon which the court proceeds in the taking of evidence, to which I have also referred. I am clearly of opinion that this defendant has no absolute right to bring the plaintiff to Toronto, and that the court will not assist him in doing so, unless he shews some good reason for it. There may be very good reasons for the plaintiff being brought to Toronto for examination ; all I can say is that none is shewn. I will point out presently what I think is the proper course, in case the defendant has some sufficient ground upon which to take the case out of the general rule. In the meantime it is right to notice some reasons that are suggested why a suitor should have the right to bring another suitor away from his residence, and from the venue of the cause to Toronto ; one is, that the examiners in Toronto, from their experience in taking evidence, take it much better than it is taken in the country ; at all events, before some of the masters,—that the truth is better elicited, that observations from professional gentlemen indirectly suggesting answers are more effectually suppressed, and irrelevant evidence, more generally excluded. This is

not without its weight. The paramount object is certainly to get at the truth ; and where it can be shewn that it cannot be got at, or got at but imperfectly without a party being brought to Toronto *from whatever cause that may be*, other considerations must give way ; but it is going too far to leave it to the will of any suitor to bring any other suitor to Toronto merely on the ground that the examiners in Toronto are more competent than those in the country. There are examiners in the country, and I hope no small number of them who are perfectly competent to take evidence, and from whose jurisdiction it would be idle to think of withdrawing an examination on the ground suggested. Another reason urged is that the examining party has to bear the expense of the examination including the conduct money of the examinant, and that this being so together with the circumstance of the costs of every proceeding in the cause being in the hands of the court, would be a check upon the wanton or vexatious use of the power, supposing it to exist of bringing an opponent to Toronto. It would be some check, no doubt, but would not meet the evil. I need hardly say that the conduct money would in a great many cases be no equivalent for the loss of time, or absence from business, which would be occasioned by an attendance at Toronto, then if the presence of the solicitor is necessary to his interests, that is, at his own expense, and where there are several defendants each choosing to examine a plaintiff at different times and places, the right might be made an engine of vexatious annoyance, with the object perhaps of forcing the examinant into a compromise.

Upon the whole, I think that, as a matter of principle, and also as a matter of convenience and expediency, a suitor has not a right to bring his opponent to Toronto, or elsewhere from his residence, for the purpose of interlocutory examination, except upon special grounds.

I think the proper course will be, where any special ground exists, to apply to the secretary upon notice ; and if he is satisfied of the propriety and justice of bringing a party to Toronto, under the circumstances, and for the reasons laid

before him, he will grant the application, and he will be at liberty to grant it upon such terms as shall appear to him to be just.

I am far from laying down as a rule, that in no case shall a party be summoned to Toronto, I concur in the propriety of this being done in a case that was put, viz., where a party desired to examine two or more defendants living in different counties, and where it was material to him that their examinations should follow one another without intermission : and there may be many other cases. I would leave to the secretary a large discretion. I only desire not to leave it to the will of a litigant to summon his opponent to such place, and at such time as he thinks fit ; and to leave it to the discretion of the court or its immediate judicial officer.

The order for the attendance of the plaintiff at Toronto will be rescinded upon his refunding the conduct money paid to him. The order will be without costs, as the defendant has acted in the matter in accordance with what appears to have been very generally understood in Toronto, as the right of examining parties.

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#### DUNCAN v. TROTT.

##### *Contempt.*

It is a sufficient clearing of contempt if a party has done the act ordered to be done, and paid the costs. It is not necessary that an order of court clearing his contempt should be made unless he has been in custody, when an order is necessary for his discharge. Where a defendant who had been in contempt for non-production of deeds, and afterwards produced, filed his affidavits and paid costs of contempt, moved to dismiss, and it was objected that he had not cleared his contempt, no order having been made to that effect, the secretary overruled the objection.

[December 23, 1869.]

This was a motion to dismiss the bill for want of prosecution.

*Mr. Walker*, for the defendant, moving.

*Mr. Downey* and *Mr. McGregor*, contra.

The circumstances under which the points stated in the head-note arose, sufficiently appear in the judgment.

THE SECRETARY.—This is a motion to dismiss for want of prosecution, made by the defendant James Trott, and looking merely at the dates when the bill was filed, and the defendant's answer put in, he seems entitled to succeed; but it is objected that he is in contempt and cannot move.

It appears that this defendant having failed to comply with an order for production of accounts, an order for his committal was obtained on the 30th of June last, and under that order an attachment was issued and placed in the hands of the sheriff of the proper county. On the 3rd of August the affidavit was filed, and the costs of the contempt paid. This, it is contended for the plaintiff, did not clear the contempt; that for that purpose an order of the court was necessary. Whether the defendant was ever actually in custody under the attachment does not appear.

When process has been carried into effect, and a defendant is in actual custody, he cannot be discharged without an order (*1 Daniell*, 2nd ed., 464.) The reason for this is obvious. When a sheriff has taken a person into custody for contempt of court, he is entitled for his own protection to an order of the court as his authority for discharging him from custody. Here, I think I may, from the plaintiff taking the objection that no order has ever been obtained by the defendant clearing his contempt, assume that the defendant never was actually in custody under the attachment. If he never was in actual custody, no order to clear the contempt was necessary. The proper course for a defendant to pursue when process has been issued against him, but has not been executed, is to perform the act for the non-performance of which he is in contempt, and pay, or tender, the costs of the contempt (*Daniell's Pr.* 464, 2nd ed.) If the plaintiff's solicitor refuses to accept the costs, it is necessary that an order should be obtained discharging the defendant from his contempt (*Green v. Thomson*, 1 S. & S. 141; *Coulson v. Graham*, 1 V. & B. 331); but this

is obtained, as of course, upon proof that the act has been performed, and the costs tendered, and would seem to be for the defendant's own protection.

In another passage Mr. Daniell says: "It would appear, moreover, that strictly in all cases of contempt (except when the plaintiff is willing to accept the answer and the costs tendered), the defendant ought, before answering, to obtain an order for his discharge upon filing an answer and payment of costs, as otherwise the plaintiff may move to have the answer taken off the file for irregularity. The case cited as the authority (*Haynes v. Ball*, 5 Beav. 141), was one in which the defendant had been brought to the bar and turned over to the Fleet. The present case comes within the exception stated by Mr. Daniell, as the affidavit on production, for want of which the defendant was in contempt, was filed on the 3rd of August, notice of filing served, and the costs of the contempt paid to and received by the plaintiff.

This case has been before me on several applications, and while I cannot say that the conduct of the plaintiff in the prosecution of his suit has been so active as it ought to have been, yet a great deal has appeared as to the conduct of the defendants which does not entitle them to much consideration. I think I shall be doing what is just between the parties when I require the plaintiff to file his replication within fourteen days after the close of the Christmas vacation, and bring the cause to a hearing at the Spring Sittings at the place where the venue is laid. The costs of this motion to be costs in the cause.

## DICKY V. HERON.

*Styling affidavits—Decree for sale—Revivor.*

Affidavits styled in short form "A., B., and others, plaintiffs," and "C., D., and others, defendants," were held to be sufficiently styled and allowed to be read.

Where under a decree for sale founded on a registered judgment certain lands were sold, and several years afterwards other lands affected by the judgment were discovered, they were ordered to be sold:

*Held,* that it was not necessary under such circumstances to revive the suit.

Heard before the late Chancellor VanKoughnet, 1868.

In this case a bill had been filed by a judgment creditor, and a decree made for sale and a reference made to the Master to ascertain the lands affected by the judgment, the Master made his report and the premises therein found affected were sold. Some years afterwards, the Bank of Upper Canada, to whom the conduct of the sale had been given, ascertained that there was another lot of land owned by the judgment debtor at the time of the filing of the bill; and thereupon a petition was filed, praying for the sale of this lot, which had in the meantime been collusively sold to another party who had been served with a copy of the petition.

*Mr. S. H. Blake*, in support of the petition.

*Mr. J. A. Boyd* urged that the decree was exhausted; and the petitioners not having kept alive their charges, were not entitled to any relief. Also, that the affidavits moved on were not entitled in the full style of the cause; and therefore could not be read; and that the suit was abated, and no proceedings could be taken until it was revived.

THE CHANCELLOR held that the effect of the decree was to subject all the lands of the debtor, following *Yale v. Tollerton* (*ante* p. 49); and overruled the objection to the style of the affidavit holding that an affidavit styled "A. B. and other plaintiffs," and "C. D. and other defendants," was sufficient, and that no revivor was necessary.

## FISKEN V. SMITH.

*Further production—Motion to commit—Notice—Changing venue.*

On a motion to commit for non-production of certain documents after an insufficient affidavit on production has been filed, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced, though the Court considered such the better course.

On such a notice the Court will grant the more limited relief, and order further production, but without costs.

The Court grants a change of venue reluctantly where delay will be occasioned by the change.

This was an application on the part of the plaintiff to commit the defendants Smith and Redford for insufficient production on the evidence taken by way of cross-examination of these defendants before the special examiner on their answers and affidavits on production. The notice of motion simply asked for an attachment for non-production.

There was also an application on the part of the defendants to change the venue from the city of Hamilton to the town of Stratford on the grounds of the great expense of bringing the defendants' witnesses to Hamilton, the greater number of them residing in the county of Perth, and that the cause of suit arose in that county. The plaintiff opposed the motion on the ground of the delay which the change of venue would occasion.

The two motions were argued together.

Mr. Snelling, for the plaintiff.

Mr. S. H. Blake, for the defendants.

MOWAT, V. C.—I have already expressed my opinion that the examination of Redford shews him to be in possession of some papers which he has not produced, or sufficiently defended himself against producing. But I reserved judgment in order to consider whether a notice of motion to commit in the form given was proper. It would be better that the notice had specified what the plaintiff demanded in addition to what has been produced; but the Secretary has reminded me of a case in which he held, with my concurrence,

that a notice like the present would do, and that the Court would grant on it such less relief as might be proper, but without costs. If there is a difficulty about the form of the order, reference may be made to me.

As to the application for change of venue I think, on the whole, I should grant it, though I do so with considerable hesitation in consequence of the delay which the change will occasion. But it seems to have been the plaintiff's own fault that the bill was not filed and the case ripe for hearing at the Stratford Sittings; and as the witnesses, with the exception of the one at Elora, reside there, some of them being practising solicitors, one the County Court Judge, &c., I think I should not refuse the order. I put out of account Mr. Snelling's affidavit, as he merely says he believes that there are witnesses residing in Toronto, giving no reasons for his belief; and he did not ask for a postponement of the motion until the close of the argument.

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#### RE KEENAN.

##### *Lunatic's estate.*

The Court will exercise a wide discretion as to the disposition of lunatics' estate; and when it appears to be necessary for the benefit of the estate will order its sale and disposition, and authorize the Committee to collect rents, &c.

*Mr. John Hoskin* presented a petition on behalf of the Committee of the lunatic in this matter, for an order and direction regarding the disposition of the lunatic's real and personal estate. The assets were \$10,000 and the liabilities \$5,000. The real estate consisted of 450 acres in Adjala; and it was about to be sold under several executions now in the Sheriff's hands. These were for small amounts, several being issued from the Division Court. If the proceedings were not stayed the property would be sacrificed. This application was made at the request of the near relatives of the lunatic. The Committee could not, from the number of mortgages and writs in the Sheriff's hands, obtain a loan or

make an amicable settlement in time to avoid the sacrifice of the property. The analogy between this and the ordinary application in an administration suit was complete. One party was dead in fact, the other dead in law, and the Court would protect the property of one equally with the other. He referred to *Shelford* on Lunacy, 357, and to *Re Davis* and *Re Kendall* there cited, but which are not reported. The case in 12 Vesey, 384, 385, there cited, as having a contrary bearing, did not, when examined, apply to these circumstances.

THE SECRETARY made the order.

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CARROLL v. ECCLES.

*Security for costs.*

Where an assignment had been made by the plaintiff of his interest in a suit to secure a claim, such claim not equalling what the plaintiff claimed in his suit, the surplus to go to the plaintiff after the claim was paid; it was held that the plaintiff had such a beneficial interest in the suit, as that no order for security for costs could be made.

[December, 1869.]

This was an application on the part of the defendant for security for costs to be given by the plaintiff on the ground that he was insolvent, and that he had assigned his interest in the subject matter of the suit so that it was being prosecuted in his name for the benefit of others.

Mr. Ferguson, for the defendant.

Mr. Hamilton, contra.

THE SECRETARY.—*Mason v. Jeffrey*, 2 Cham. Rep. 15, is cited as an authority for granting this application. That case however differed from the present. There, a person having made a claim against an insolvent's estate, the assignee of the insolvent filed a bill alleging that Mr. Ketchum was to indemnify the insolvent against the claim now made; and praying

that the debt might be paid out of Ketchum's estate. For the defendant claiming security it was alleged that the assignee in insolvency was himself insolvent; that there were no assets of the insolvent's estate, and that the suit was really being prosecuted for the benefit of the person making the claim on the insolvent's estate, and was in fact being carried on under his instructions and at his expense. No affidavit being filed by the plaintiff in answer to these allegations, Vice Chancellor Mowat made an order for security.

The evidence on which it is sought here to obtain an order for security, is an affidavit by a clerk of the defendant's solicitor, and the depositions of the plaintiff himself. The clerk proves that some interlocutory costs have been demanded from the plaintiff and remain unpaid, and says that he heard the plaintiff, while under examination before one of the special examiners of the Court, say that he had assigned all his interest in the suit, and had nothing any longer to do with it. The plaintiff, in his depositions, says the suit is being conducted for his own benefit by his solicitor. He says further, that in the early part of the year he assigned his interest in this suit to pay off a certain claim against him the surplus to go to him after the claim is paid. He says whether there will be any surplus depends upon the taking of the accounts, and upon the defendants paying what may be found due, and he claims that the defendants are indebted to him in an amount greater than the claim which he has sought to secure by the assignment.

I think, looking at the case before me, that although the plaintiff has made a partial assignment of his interest in the suit, yet he has still a beneficial interest in the result of the suit and entitled to prosecute it, so that I cannot make the order asked. The motion will therefore be refused with costs. These costs to be set off against any costs due from the plaintiff.

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TO THE

## PRINCIPAL MATTERS.

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### ABATEMENT.

1. A suit does not abate by the death of one of the plaintiffs if others remain on the record having similar interests and capable of maintaining the suit.

*Alchin v. Buffalo*, 45.

2. Where a plaintiff had assigned in part his interest in the subject matter of the suit, an objection that the suit had abated was overruled.

*McDonell v. Mining Co.*, 400.

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### ABSENT DEFENDANT.

Where the interest of an absent defendant appeared to be very trifling indeed, and he resided out of the jurisdiction, on an application for service on him by mailing, the Secretary made an order dispensing with service on him altogether.

*In re Hare, Carpenter v. Kelly*, 417.

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### ACT 29 VIC., CH. 28.

*See JUDICIAL OPINION.*

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### ACT 29 & 30 VIC., CH. 24.

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### ADDITION AND DESCRIPTION OF PARTIES TO A PETITION.

A petition should set out the addition and description of the petitioners in the same manner and with the same certainty as a bill of complaint.

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**ADMINISTRATION ORDER.**

1. An administration order will not be granted where the grounds upon which it is claimed are properly the subject of a bill.

*Re Macdonald*, 29.

2. In moving for an administration order the letters of administration should be produced.

*Re Israel*, 392.

Though strict proof of the claim is not necessary, yet a *prima facie* case must be made before administration order granted.

*Re Clarke*, 57.

**ADMISSION OF EVIDENCE.**

1. The Court will not refuse to admit evidence recently discovered even after a cause has been set down for hearing on a petition for review.

Where a cause is against the representatives of a deceased trustee who had been defendant, the Court in its discretion will exercise a greater degree of indulgence in the reception of new evidence than if the original defendant himself, who should have known the circumstances, was living.

*Small v. Eccles*, 97.

2. An application to take evidence after hearing should be by petition and in Court. An application made in Chambers was dismissed with costs.

*Nichols v. Moore*, 474.

**ADVERTISEMENT.**

*See SETTLING ADVERTISEMENT.*

**ADVERTISING.**

Where, by an oversight, an advertisement had been inserted only three times instead of four, on an application for an order *pro con.*, it was ordered that defendant be readvertised the proper number of times.

*Patrick v. Ross*, 459.

**AFFIDAVITS.**

1. Where an affidavit purported to be sworn in the United States before a Notary Public, and had the signature and

notarial seal of such notary, *held* to be sufficient without proof *al iuvante* of such signature.

The order that an affidavit shall state the source of information of a deponent who swears as to his information and beliefs, is directory; and it is competent to the Court to relax it in a proper case, and where the ends of justice would be served by so doing.

On the granting of an interim injunction, the plaintiff had leave reserved to file a certain affidavit. On a subsequent day on a postponement of the argument, it was arranged that no further affidavits should be filed, the affidavit referred to was then in Court but not filed, but was filed at a subsequent hour of the day. On an objection being made to its reception, it was held receivable.

**Merchants' Union Express Co. v. Morton and Thompson, 319.**

2. The affidavit of the non-payment of the mortgage money in a suit for foreclosure or sale should not be made on the day the money is due, but subsequently.

**Blong v. Kennedy, 458.**

3. An affidavit made by the plaintiff's agent stating that he had the management of all the plaintiff's business in this country, was held as sufficiently shewing his source of information.

The expression "owner in fee" held to mean the beneficial owner.

**McEwen v. Boulton, 399.**

4. An affidavit will not be allowed to be read if it contains alterations which are not initialed by the Commissioner before whom it is sworn.

**Crippen v. Ogilvie, 304.**

5. All erasures and interlineations in affidavits must be initialed by the Commissioner before whom it is sworn, otherwise it cannot be read.

The notice of motion in referring to an affidavit should state the day on which it was filed.

**McMartin v. Dartnell, 322.**

6. Where the affidavit on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor altogether unconnected with the dealings between the solicitor and the client, such allegations were held to be scandalous, and were ordered to be struck out of the affidavit.

**In re Fitch, 288.**

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**ALIMONY.**

1. In an alimony case where the marriage is admitted or proved, interim alimony will be granted almost as a matter of course notwithstanding that the defendant swears he is willing to receive and maintain the plaintiff.

**Carr v. Carr, 71.**

2. *Interim alimony* will be granted on *prima facie* proof of the marriage, although the validity of the marriage is disputed.

**McGrath v. McGrath, 411.**

3. An application for *interim alimony* must be upon notice.

**Swinerton v. Swinerton, 458.**

4. On a question arising under the Act 32 Vic. ch. 18, and the General Order 491, it was held that the plaintiff in an alimony suit is not entitled to the \$40 mentioned in the Order.

**Gibb v. Gibb, 402.**

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**ALLOWANCE OF ERROR APPEAL BOND.**

*See APPEAL BOND.*

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**AMENDING.**

1. An application for leave to amend after decree will not be granted *ex parte*.

**Bank of Montreal v. Power, 47.**

2. Leave to amend was refused when the proposed amendment was an allegation, that a mortgage was made whilst the mortgagor was in a state of insolvency.

**Curtis v. Dale, 184.**

3. Where a question affected the right of the government to the land granted in a patent the Attorney General was held to be a necessary party, and leave to amend was granted to enable him to be added as a party although the defendant was in a position to move, and made a counter motion to dismiss, but the defendant was allowed costs.

**Great Western Railway Company v. Jones, 219.**

4. An order to amend which is obtained before serving the bill, does not require service. Where a bill has been amended and the affidavit was of service of "the bill," the Court presumed the bill served was the bill as it stood at the time of service.

**Bolster v. Cochrane, 827.**

5. The Court will allow an amendment where an unimportant mistake has been made in a name which has misled no one, and the right person been served.

The Court does not favor objections of this nature, and refused an enlargement; where, but for such mistake, the proceedings were regular and ample notice had been given.

*Re Fraser*, 457.

6. A plaintiff having failed to amend his bill till the time within which he could do so had expired, owing to the pendency of a motion to dismiss; held, that the motion to dismiss was not a sufficient excuse for the delay,—and held further, that the plaintiff might, under the circumstances, file an additional affidavit, the former being insufficient, and then renew the application.

*McDonell v. Mackay*, 248.

7. A plaintiff will be allowed to amend even after the expiration of twenty-eight days from filing the answer where such plaintiff has been delayed by the defendants not obeying the order to produce within proper time.

*Archibald v. Hunter*, 277.

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#### AMENDING DECREE.

A decree can only be amended on an application in Chambers, when it is not drawn in accordance with the judgment, or some necessary consequential direction has been omitted.

The plaintiff has, in the absence of any expression of the Court, a right to take the reference to the place where the bill was filed.

*Watson v. Henderson*, 370.

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#### AMENDING AFTER DECREE.

An application to amend after decree under Order 438, by adding a party interested in the equity of redemption, need not be on petition, but is properly made on motion.

Where such a motion was opposed on the grounds of irregularity as not being by petition, the costs of opposing it were refused.

*Harrison v. Grier*, 440.

2. No amendment of the bill will be allowed after decree.

*Lawrason v. Buckley*, 334; see also *Bank of Montreal v. Power*, 47.

**AMENDING AFTER REPLICATION.**

A plaintiff may amend after replication by adding parties without withdrawing his replication.

*Johnson v. Rowan*, 13.

**AMENDING INFORMATION.**

Where an information had been amended by merely adding a party by the direction of the Court, a motion to take the amended information off the files because not signed by the Attorney General, was refused.

*Attorney General v. The Toronto Street R. W. Co.*, 321.

**AMENDING INTERPLEADER ISSUE.**

*See INTERPLEADER.*

**AMENDING SHERIFF'S RETURN.**

*See SHERIFF'S RETURN.*

**AMENDING WITHOUT PREJUDICE TO INJUNCTION.**

1. A motion to amend without prejudice to an injunction will not be granted *ex parte*.

If the amendments are such as could be made without a special application, the order can be obtained on *præcipe*; if not, notice must be given to the parties affected by the amendments.

*McGregor v. Maud*, 387.

2. Amendments of a material character will not be allowed without prejudice to a pending motion for injunction.

*Davy v. Davy*, 81.

**ANSWER.**

## 1. Swearing and identifying answer.

*London v. London*, 40.

2. Where service has been effected on an agent, and it can be shewn that the time allowed for answering is insufficient to enable him to communicate with his principal, and to get in the answer on an affidavit of a good defence on the merits, a defendant will be granted leave to file his answer although an order *pro con.* has been taken.

*Irwin v. Lancashire Iusurance Co.*, 293.

3. The time for answering is not changed by the Consolidated Orders. The period is four weeks not a calendar month.

A foreign company having an office in Montreal and another in Toronto, an office-copy bill, with an indorsement to answer in four weeks, served on the agent in Toronto, was held, sufficient service.

*Irwin v. Lancashire Insurance Co.*, 291.

*See DEMURRING, 3.—SWEARING ANSWER.—TRANSMITTING ANSWER.*

### APPEALING.

1. When a cause had been reheard and the original decree affirmed, and an appeal was brought within a year of the decree on rehearing: *Held*, that the appeal should have been within a year of the original decree, and that in consequence of the delay, a special application for leave to appeal was necessary.

*Macfarlane v. Dickson*, 38.

*See TYLER v. WEBB*, Vol. 3, p. 33.

2. The Court will extend the time for appealing to the Court of Error and Appeal, upon the party appealing shewing reasonable cause for the delay that has taken place.

*Box v. Provincial Insurance Co.*, 397.

*See STAYING PROCEEDINGS.—LEAVE TO APPEAL.*

### APPEALING FROM COUNTY COURT.

In an appeal from a County Court Judge an objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal.

Where the appellant was described as Wm Darling, and the opposing creditors appeared to be Wm. Darling & Co., it was considered ground for refusing to entertain the appeal.

An appellant in insolvency must apply promptly.

*Re Sharpe*, 67.

### APPEALING FROM SECRETARY.

1. A party cannot use affidavits not used before Secretary or make a new case in appeal, nor will the Court entertain a motion to reinstate a bill based on grounds which might have been shewn in resisting a motion to dismiss.

*Bank of Montreal v. Wilson*, 117.

2. Before an appeal will lie from the Secretary's decision, the order thereon must be drawn up and entered.

*Gibb v. Murphy*, 132.

3. A motion by way of appeal from an order made in Chambers, must be made within the fourteen days limited by the Consolidated Orders, unless an order for further time has been obtained. Without leave, it is not sufficient that the notice of motion be given within the fourteen days.

*Jackson v. Gardiner*, 385.

*See CHAMBERS ORDERS.*

#### APPEALING FROM MASTER'S CERTIFICATE.

An appeal from a Master's certificate of costs should be to the Court, not to a Judge in Chambers.

*Grahame v. Anderson*, 303.

#### APPEAL FROM MASTER'S REPORT.

1. Where a proper case was made explaining the delay, leave to appeal from the Master's report was granted, although the time limited for appealing had expired.

It is not necessary on such an application to shew the sufficiency of the grounds for appealing.

*McQueen v. McQueen*, 471.

2. The Court will not entertain an appeal from the Master where the matter in question is one involving only a very trifling amount and no point of principle is involved; where, therefore, an appeal was brought where the matter in question was only some \$6.00 or \$10.00, the appeal was dismissed with costs.

*McQueen v. McQueen*, 344.

#### APPEAL FROM MASTER'S RULING.

Appeals from the Master's ruling, as well as appeals from the Master's reports, should be to the Court and not in Chambers.

*Jay v. McDonell*, 71.

#### APPEAL BOND.

It is not necessary to move for the allowance of an error and appeal bond, if not moved against within fourteen days from notice of filing given, it stands allowed.

*Read v. Smith*, 326.

**APPEAL DECREE.**

*Semble*, a motion to make a decree of the Court of Appeal, an order of the Court of Chancery, may be made in Chambers if it is sought to make the order in the terms of the decree of the Court above, but, if further directions or new terms are necessary to carry out the decree in Appeal, the motion should be to the Court.

Weir v. Mattheson, 10.

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**ARBITRATION.**

1. This Court has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contains no submission to pay, where the reference has been made an order of the Court, and will, in such a case, order a reference to the Master, and not oblige the party to sue at law.

Armstrong v. Cayley, 163.

2. Where parties had entered into an agreement to refer any future differences that might arise under a partnership between them to arbitration, and one filed a bill for an account, injunction and receiver, on an application for a stay of proceedings under the Common Law Procedure Act, the Secretary granted the order, though answer had been filed in the suit, and the bill contained allegations of fraud, it being evidently a case in which substantial justice between the parties could be done by arbitrators.

White v. Kirby, 414.

3. Where, under a submission, it was provided that arbitrators should appoint an umpire in case of disagreement, their appointing such an umpire was held sufficient evidence of their having disagreed, without any allegation of that fact on affidavit.

An application to make an award a rule of Court can properly be made in chambers on notice.

White v. Kirby, 452.

4. An award in pursuance of a reference by the Court, will be treated as a judicial act, and made an order of this Court as a matter of course. It is not necessary to wait until after a term before moving to make it an order of Court.

Allan v. O'Neil, 452.

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**ARBITRATOR.**

When a submission was made to an arbitrator "to determine which of said several items of claim, the estate of Mr. B. is

bound as a matter of law to pay": *Held*, that this confined the authority to deciding the question of legal liability, and did not authorize the arbitrator to find sums payable; under such a submission, the arbitrator gave interest: *Held*, that he was authorized to consider the liability for interest, although he could not correctly find the amount due.

**Armstrong v. Cayley, 128.**

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**ARREST, WRIT OF.**

I. The Court, in an alimony suit, on a motion to discharge the defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff has reasonable grounds to expect to succeed in her case, and, in the absence of her shewing such fair and reasonable grounds, or in the event of the defendant displacing the *prima facie* case made by her on obtaining the writ, he will be discharged.

A writ of arrest had been granted on the affidavit of the plaintiff, alleging violence and ill-treatment on the part of the defendant, and shewing that the defendant had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the violence and ill-treatment were denied.

The plaintiff was shewn to be a young robust woman, the defendant an old man of sixty-eight years, and the conduct of the plaintiff to have been violent, and immoral, and unchaste.

On the denial of the defendant of any intention to leave the Province, and under the circumstances above stated, the writ was ordered to be set aside.

**Macpherson v. Macpherson, 222.**

*See IMPRISONMENT FOR DEBT.—EXECUTOR.*

—♦—  
**ATTACHMENT.**

1. Motion for attachment must be on notice.

**Murphy v. Feehan, 53.**

2. It is improper to have recourse to an attachment when the object sought can be attained without such process. Where, therefore, a party directed to execute a conveyance, had come into town for the purpose of executing it, although after the period in which strictly it should have been done, and the plaintiff's solicitor, with a knowledge of these facts, issued an attachment, it was set aside with costs.

**Mason v. Seeney, 220.**

3. A party will not be committed for disobedience of an order, where the act ordered to be done, is in fact and in effect, merely the payment of money.

Male v. Bouchier, 251.

4. A direction to do an act " forthwith " is a sufficient compliance with orders 288 and 293.

Where, under an order so endorsed, a party was attached for disobedience, the attachment was held to be regular, and the parties only entitled to their discharge on compliance with it.

5. Where the attorney of the parties, directed to confess judgment at law, had been arrested for disobedience of the order, as well as the parties themselves, his arrest was held to be irregular, and his discharge ordered.

Wallace v. Acre, 392.

—•—  
ATTORNEY.

*See ATTACHMENT, 5.*

—•—  
ATTORNEY GENERAL.

*See PARTIES.—COSTS.*

—•—  
BILL.

Where a bill had been filed, not complying with the Orders, the dates not being expressed in figures, although the bill was printed and not being in pica type nor of the usual size as required by the Orders, the service of a copy of it was set aside, the fact of the Deputy Registrar receiving and filing it, not being deemed a bar to the motion.

Cossey v. Ducklow, 227.

*See PLEADING.*

—•—  
BILL REMAINING ON THE FILES UNSERVED.

Where a bill has been filed and a *lis pendens* registered, but no office-copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs.

Somerville v. Kerr, 154.

*See DISMISSING BILL.*

—•—  
BILL OF COSTS.

*See COSTS.—SERVICE.*

## INDEX TO THE

**BILL TO REDEEM.***See PLEADING.***CARRIAGE OF DECREE.**

1. No order is necessary under No. 211, Consolidated Orders, to authorize the defendant to take the carriage of a decree out of the plaintiff's hands.

*Smith v. Henderson, 304; Emes v. Emes, 54.*

**CHAMBERS ORDERS.**

An order made by a judge on an appeal from the Secretary, is a Chambers Order, and if costs or further directions are reserved, they should be disposed of before a judge in Chambers, and the order made thereon, entitled "In Chambers."

Where, therefore, in such a case the cause was set down, and in the list of causes to be heard on further directions, it was held to be improperly set down, and the costs of the day given against the party setting it down.

*Dudley v. Berzcy, 460.*

**CHANGING SOLICITOR.**

*See BAILEY v. BAILEY, 57.*

**CHANGING VENUE.**

1. The venue in a case should be selected with a due regard to the convenience of the suitors and of the witnesses. And if the venue laid in the bill is not so selected, an order to change it will be made.

The circumstance of the Master, at the town to which the venue was sought to be changed, having been at one time concerned as an arbitrator between the parties to the cause, was held no sufficient reason for not taking the suit before a judge there.

*Mallory v. Mallory, 404.*

2. When it is shewn that the convenience of witnesses would be better served by a change of venue, such change will be made without costs.

*Chard v. Meyers, 391*

3. The Court grants a change of venue reluctantly where delay will be occasioned by the change.

*Fisken v. Smith, 491; see also Baxter v. Campbell, 39.*

### CHURCH PROPERTY.

A deed to come within the Statute 24 Vic. ch. 43, must have been registered within a year after the passing of it.

The advertisement required by the Act should specify the terms of sale.

A deed of church property ought to shew how the successors to the trustees named are to be appointed.

*Re Baptist Church Property, Stratford, 388.*

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### CLERICAL ERROR.

*Held*, that a motion to correct a clerical error should be on notice.

*Simpson v. Ottawa Railway, 12.*

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### COMMISSION.

1. A commission cannot regularly be issued until after replication filed.

*Royal Canadian Bank v. Cummer, 388.*

2. All examinations under foreign commission must be by interrogatories, unless otherwise arranged by consent.

*Gordon v. Elliott, 471.*

*See POSTPONING HEARING.*

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### COMPENSATION.

The growing crops on land are part of, and go with, the freehold when it is sold. When, therefore, a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money, and the same order was made to extend to taxes due on the land and unpaid.

*Stewart v. Hunter, 335.*

2. A motion for compensation for want of possession should be made in Court, not in Chambers.

*O'Dea v. Sinnott, 446.*

*See DOWER, 3.*

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### CONDITIONS OF SALE.

*See SALE,*

## CONFIRMING SALE.

*See SALE, 3, 4.*

## CONTEMPT.

1. Where a party is in contempt for not bringing in accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into.

*Clancy v. Patterson, 217.*

2. A party is not in contempt for non-compliance with an order of Court until the opposite party by some step brings him into contempt; if such party omits to do this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches.

*Gillespie v. Gillespie, 267.*

3. It is a sufficient clearing of contempt if a party has done the act ordered to be done, and paid the costs. It is not necessary that an order of Court clearing his contempt should be made unless he has been in custody, when an order is necessary for his discharge.

*Duncan v. Trott, 487.*

4. Where a defendant who had been in contempt for non-production of deeds, and afterwards produced, filed his affidavits and paid costs of contempt moved to dismiss, and it was objected that he had not cleared his contempt, no order having been made to that effect, the Secretary overruled the objection.—*Ib.*

*See COSTS, 3.*

## CONSENT BY SOLICITOR.

*See BAILEX v. BAILEY, 58.*

## CONVEYANCE BY INSOLVENT.

*See INSOLVENT.*

## COSTS.

1. The rule that the Crown neither claims nor pays costs is that which the Court favors as most consistent with the dignity of the Crown, and practice of the Court—and where the Crown is made a party in consequence of the discharge of an international duty, and out of courtesy, or for form's sake, having no real or substantial interest in the question at issue, and no interest would have suffered, and no loss accrued by the Crown disclaiming or not appearing, the Court will certainly not order costs to be paid to the Attorney General.

*United States v. Donison, 263.*

2. Where a defendant has obeyed an order, and tendered a sufficient sum for the costs thereof, which the plaintiff's solicitor declined to accept, the defendant was given his costs of motion, less the sum tendered.

Franklin v. Bradley, 444.

3. The Court will not hold a party who has been in contempt for not obeying an order, in gaol for non-payment of the costs occasioned by his contempt.

Pherrill v. Pherrill, 444.

4. The Court will direct the costs of the guardian to be paid before granting a vesting order to the purchaser.

Thorne v. Chute, 221.

5. A bill of sale was filed by a *puisne* incumbrancer, and prior incumbrancers and mortgagees were made parties in the Master's office, and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient to pay the first incumbrancer.

An application on part of the plaintiff to have his costs of suit and of sale paid out of such proceeds, in preference to the first incumbrancer was refused with costs.

Grange v. Barber, 189.

6. A purchaser, whose vendor had died and who had paid the purchase money, partly to the vendor in his lifetime, and the balance to his administrator, brought an action to recover back the purchase money, when a bill for an injunction was filed, a good title was subsequently shewn; the purchaser, the defendant in the injunction suit, was ordered to pay the costs down to the hearing of the cause.

Van Wormer v. Harding, 199.

7. When the Registrar is directed to fix the amount of interlocutory costs, a bill of such costs should be filed.

Saunders v. Furnivall, 55.

8. The month which the Statute requires to elapse before a solicitor can take proceedings to recover costs must be reckoned exclusive of the day on which the bill is rendered and the day on which the petition to tax is presented.

Re Morphy & Kerr, 56.

9. It is irregular to take out a *fi. fa.* the instant costs are taxed, without allowing a reasonable time to the solicitor whose client has to pay them, to communicate the result of the taxation.

Cullen v. Cullen, 94.

See TAXATION.—INFANTS, 8, 3.—POSTPONING HEARING, 3.

**COSTS OF EXECUTOR DE SON TORT.**

Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred.

*Sunley v. McCrae, 231.*

*See POSTPONING HEARING.*

**CREDITOR'S SUIT.**

In a suit instituted by a creditor of the estate of a deceased debtor who had made an assignment for the benefit of his creditors, certain other creditors who had not signed or accepted the deed of assignment, sought to come in under the decree and partake of the benefit of the trusts. The trust deed had been made in 1857. The assignor had died in 1863. The assignment was to be executed by the creditors within two months of its date. The accountant declined to receive proof of the claims, and an application in Chambers for leave to come in and sign the deed and participate in the residue of the estate, was refused.

*Schreiber, v. Fraser, 271.*

**CROSS-EXAMINING A DEFENDANT.**

Where a defendant lived at Hamilton, and the bill was filed at Toronto, plaintiff took out an appointment to cross-examine the defendant before the Deputy Master at Goderich, the appointment was set aside with costs.

*McDermid v. McDermid, 372.*

*See EXAMINING, &c.*

**DECREE.**

The fourteen days given to proceed on a decree count from the pronouncing, not the entering of the decree.

*Emes v. Emes, 21.*

**DECREE ON BILL AND ANSWER.**

When a cause is heard on bill and answer, the plaintiff has the right of electing to pay the costs of the day and file replication and go to hearing in the usual way; and even in a case where he had accepted the decree on bill and answer, and on coming to settle minutes, was dissatisfied with it, he was allowed the same option, on the ground that he could have exercised it on a rehearing or on appeal.

*Russell v. Breeken, 253.*

**DECREE FOR SALE.**

Where, under a decree for sale, certain lands were sold, and several years after other lands were discovered affected by the same judgment, they were ordered to be sold:

Dickey v. Heron, 400.

**DEFECTIVE SUIT.**

When a suit becomes defective, and is proceeded with without an order of revivor being taken out, a subsequent application by petition, to supply the defect by adding parties, is not improper, but the new parties may not be bound by the proceedings had in their absence.

Peck v. Bucke, 294.

**DELIVERY OF POSSESSION.**

Where a decree by oversight contained no direction as to giving up possession, a supplemental order directing the delivery up of possession was made on payment of costs.

Mason v. Seeney, 30.

*See Possession.*

**DEMURRING.**

Demurrer filed pending motion to take *pro con.*, held to be in time.

White v. Baskerville, 40.

2. The omission of any formal part in a demurrer (such as the heading thereof) is an irregularity, which entitles the plaintiff to have the demurrer taken off the files, unless an amendment is permitted.

Bennett v. O'Meara, 167.

3. Further time given to answer will not carry with it a right to demur after the usual time. Where a plaintiff's solicitor had given further time to answer, and instead of answering the defendant's solicitor filed a demurrer, the demurrer was ordered to be taken off the files.

Boulbee v. Cameron, 41.

4. Where a demurrer is filed for want of parties as well as for want of equity, the question of parties must be disposed of before the demurrer for want of equity can be argued.

Malcolm v. Malcolm, 200.

5. The giving time to answer does not authorize the defendant to demur after the time for answering has expired.

Chamberlain v. McDonald, 204.

*See PLEADING.*

## DEPOSITIONS.

A motion to read the depositions taken in another cause between other parties must be made on notice.

A motion for such an order made *ex parte* was refused.

Dunlop v. The Corporation of York, 417.

## DEVISE.

Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence shewing an intention that such last mentioned devises should be free from dower; it was held that on the widow electing to take dower she forfeited not only the first mentioned parcel of land, but also the other.

Stewart v. Hunter, 336.

## DISMISSING BILL.

In a redemption suit where one of the two defendants had died, a motion was made on part of his executors and of another defendant to dismiss for want of prosecution; the same solicitor appearing for both. Notwithstanding some delay on the part of the plaintiff, which was not fully accounted for, the order was made in the alternative, that he revive and go to hearing on terms, or be dismissed.

*Held*, in accordance with the decision in Spawn v. Nelles, 1 Cham. Rep. 271, that a defendant is not obliged, after replication filed, to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution.

*Semble*, where a suit abates by the death of one of the defendants, the defendant may move to dismiss for want of prosecution, without moving that he revive; but if deceased defendant and the surviving defendant be both represented by the same solicitor, the order will be to revive or bill dismissed.

*Semble*, also, a motion to dismiss will be entertained even after replication filed.

Rice v. George, 74.

2. Where defendant had moved to dismiss the plaintiff's bill and the plaintiff had asked for time which was granted, but the plaintiff failed to proceed within the time given. It was held that the defendant could move *ex parte* for the order to dismiss.

Burns v. Chisholm, 88.

3. One of the surviving defendants may properly move to dismiss, though suit has become abated by the death of another defendant.

*Kelly v. Macklem*, 132.

4. As to dismissing bill, see also

*McNab v. Morrison*, 133.

5. The fact that a defendant has put in an insufficient affidavit on production is no bar to his moving to dismiss.

*Gillespie v. Gillespie*, 267.

6. Where a motion to dismiss was made by certain defendants who had been made parties by amendment at a comparatively recent date, delay having occurred previously in the conduct of the cause, they were not permitted to shew such delay as a ground of dismissal, and an order to dismiss made by the Secretary, whose attention had not been called to the fact of the parties moving having become parties at a recent period, was reversed, but with costs against the plaintiffs, they having been guilty of delay.

*The Upper Canada Mining Co. v. The Attorney General*, 207.

7. The Court will exercise a discretion in granting or refusing an order to dismiss and consider the peculiar circumstances of the case.

Where, therefore, the defendants had been dilatory in obeying the order to produce and refused to go down to hearing by consent, when plaintiff being too late to go down otherwise, applied for a consent, an order to dismiss was refused, and under the same circumstances an order to open publication and for leave to set down cause for the following examination and hearing term was granted.

*Jeffs v. Orr*, 278.

8. When a plaintiff swears to a good case on the merits, the Court will, in its discretion, give him an opportunity to hear his case on the merits, even after an order to dismiss has been properly granted.

*Rees v. The Attorney General*, 300.

9. Where security for costs is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be granted *ex parte* on a certificate that no bond for security has been filed.

*McCarroll v. McCarroll*, 380.

10. If a bill is filed and no office-copy served within the period limited for service (three months), the bill will, on application, be dismissed.

It is no answer to a motion to dismiss, under such circumstances, that the bill was filed previous to 1864, when the order limiting the time was passed.

Moore v. Roseburgh, 406.

11. A bill cannot be dismissed even by consent after a decree has been made in the cause.

Ontario Bank v. Campbell, 458.

12. On a motion to dismiss the bill of a married woman the Court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend.

The Court will not hold a plaintiff bound in every case to prepare for hearing before the defendant has made production under the order to produce, where that order has been taken with promptitude. Where, therefore, the defendant having anticipated the time for answering, and an insufficient affidavit on production, was filed just in time to leave the plaintiff a single day before giving notice, supposing no amendments required, the Court refused a motion to dismiss.

Poole v. Poole, 475.

See RESTORING DISMISSED BILL.

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## DOWER.

1. Where a married woman had signed a deed which, however, contained no bar of dower, the Secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred, such relief would be properly the subject of a bill.

Thompson v. Thompson, 211.

2. Where after a husband's estate had been transferred to A., a purchaser, his wife executed a deed to A., containing a release of dower by her, but no words of release or conveyance by the husband :

*Held* sufficient to bar the wife without examination before Magistrates or a Judge.

Heward v. Scott, 274.

3. In case of a sale of land a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money ; the value is to be computed with reference to the nature of the property.

Stewart v. Hunter, 336.

## ENDORSING PAPERS.

1. An irregularity in the endorsement on pleadings of the name and place of abode of the solicitor filing the same is waived by demanding and receiving a copy of such pleading.

Bennett v. O'Meara, 167.

2. Where the plaintiff's solicitor had been changed, and an order for such change served upon the defendant's solicitor, who had acted under such change by serving the new solicitor with notice of filing bond for security for costs of appeal; an objection that a proceeding subsequently taken was not endorsed with the name and place of business of the new solicitor was overruled.

McDonell v. Mining Co., 400.

3. Under general orders 40 and 41 it is necessary that the name of the solicitors, and if agents, the name also of the principals for whom they act, should be endorsed on all the papers served in the suit, the provision in order 41 only renders it unnecessary to endorse the "place of business" on subsequent papers after it has been endorsed on the first paper served.

Coates v. Edmondson, 439.

## ENTITLING PAPERS.

Where the affidavits on which an allowance of an appeal from a County Court Judge was sought, were not entitled in any Court, they were not allowed to be read.

*Re Sharpe*, 67.

## EVIDENCE.

An application to take evidence after hearing should be by petition and in Court, and an application made in Chambers was dismissed with costs.

Nicholl v. Moore, 474.

## EXAMINING DEFENDANT.

1. An application for an order for the defendant to attend at his own expense, and be examined on his answer, may be made *ex parte*.

Harrison v. Greer, 438.

2. The examination of a defendant under the general order 138 is the substitute for discovery by interrogatories, and to entitle a plaintiff to examine on any particular subject he must make a case for it in his bill.

Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused with costs.

*Dickson v. Covert*, 342.

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#### EXAMINING A HUSBAND OR WIFE DEFENDANT ON ANSWER.

A husband is liable to cross-examination on his answer to a bill filed by his wife against him.

*Patterson v. Kennedy*, 372.

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#### EXAMINING *DE BENE ESSE*.

1. Order made *ex parte*.

*Oliver v. Dickey*, 87.

2. An order to examine a witness *de bene esse* will be granted on an *ex parte* motion.

*Crippen v. Ogilvie*, 304.

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#### EXAMINING PARTY OR WITNESS BEFORE SPE- CIAL EXAMINER, OR MASTER IN THE COUNTRY.

As a rule, a suitor has not a right to bring his opponent to Toronto, or elsewhere from his residence for the purpose of interlocutory examination, except upon special grounds.

Where therefore an order had been made by the Secretary for a plaintiff to attend before a special examiner at Toronto, the venue of the case being laid at Goderich, and the parties residing there, and the plaintiff's solicitor residing there also, the solicitor for the examining defendant residing in Toronto; such order was rescinded upon the plaintiff refunding the conduct money paid him without costs, the defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as the right of examining parties.

The proper practice in a case where special grounds exist, is an application on notice in Chambers shewing such special grounds.

*Gallagher v. Gardiner*, 480.

### EXECUTORS.

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost ; the Court held the executor guilty of a breach of trust with respect to the money, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest.

*Lawson v. Crookshank*, 426.

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### EX PARTE MOTION.

The Court will not grant an order on an *ex parte* application unless the practice distinctly authorizes it.

On an application for payment out of redemption money in Court, the application was refused.

*Totten v. McIntyre*, 462.

*See EXAMINING DEFENDANT*, 1.

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### EX PARTE ORDERS.

The Court does not favor the granting of *ex parte* orders, except in case where the practice clearly authorizes them.

An application to compel the defendant's solicitor to deliver an office-copy of the answer was refused, because made *ex parte*.

*Stewart v. Richardson*, 443.

An *ex parte* order will not be set aside because it is not entered.

*McEwen v. Orde*, 278.

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### EXTENDING TIME FOR APPEALING.

*See LEAVE TO APPEAL.—APPEALING.*

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### EXTENDING TIME FOR PAYMENT OF MORTGAGE MONEY.

1. A Judge in Chambers, though not as a matter of right, extended the time for the payment of mortgage money where the money was for purchase money, and the vendor had made a prior mortgage on the property which he had not paid off according to his covenant for title, and it appeared that the existence of the first mortgage prevented the plaintiff from raising money to pay off the second.

*Gould v. VanKoughnet*, 33.

2. Where through the default of the defendant in the payment of his mortgage, the plaintiff has had to raise money on security of the land, and a very considerable delay had taken

place before the application was made and a final order of foreclosure had issued; the Secretary refused to set aside the order and extend the time for payment.

**Waddell v. McColl, 58.**

3. Where the plaintiff can be replaced in the same position as he occupied before default, and recompensed for any damage he may have suffered, and there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure.

**Waddell v. McColl, 62.**

4. The time for payment of mortgage money was extended, where it was shewn that the defendant was hampered and hindered in selling or raising money on lands in consequence of an advertisement signed and circulated by the plaintiff's solicitors. Under the above circumstances the motion was granted without costs to the plaintiff.

**Gilmore v. Myers, 179.**

5. Where the day to pay money reported due on a mortgage was past, the Court allowed the mortgagor six months further time to redeem, on condition of paying the costs of the motion and interest on the whole sum found due, it appearing that the security was good, and the mortgagor in a fair way to raise the money.

**Street v. O'Reilly, 270.**

6. The Court will exercise a discretion in granting an enlargement of time for payment of mortgage money, and where a reasonable case is made out, will extend the time on such terms as are considered just. Where, therefore, delay was shewn on the mortgagors part, but he shewed a reasonable prospect of being able to pay in a few months, the principal and interest were ordered to be capitalized and interest on the whole paid, and the costs of the application paid in a week.

**Cahuac v. Durie, 394.**

7. An extension of time for payment of money appears to be granted only in cases where a forfeiture would result from its nonpayment.

**Lawson v. Crookshank, 373.**

8. Six months further time was given for payment of the mortgage money, on an application made the day before the mortgage was due, when it was shewn that the property would be greatly enhanced in value in the meantime by the construction of a contemplated railway, on payment of interest on principal and interest due and the costs of the application.

**Cameron v. Cameron, 375.**

**FI. FA.***See Costs, 9.*

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**FINAL ORDER.**

Where a purchaser of the equity of redemption paid amounts found due to plaintiff, it was held that this was a payment by defendant, or some one on his account, and the final order of foreclosure was set aside.

*Reid v. Cooper, 90.*

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**FORECLOSURE.**

A purchaser from a party in whose favour the Court has decreed final foreclosure, has a right to presume that the Court has taken the necessary steps to investigate the right of the parties, and has, on that investigation, properly decreed foreclosure.

The Court will not set aside a foreclosure after the estate has been acquired by a *bona fide* purchaser for value on account of a slight irregularity in one of the papers on which the order for foreclosure was granted. Where, therefore, a party who was a second mortgagee and had been solicitor for the plaintiff, purchased the estate from one who had, for aught that appeared, purchased in good faith for value of the plaintiff, without notice of any irregularity, and the order for foreclosure was set aside by the Secretary on account of the absence of a date in the bank manager's certificate; an application by the purchaser from the plaintiff, in which the subsequent purchaser joined, to set aside the Secretary's order was granted with costs.

It was held that the joining in such application by the subsequent purchaser, was not irregular but surplusage at most.

The defendant having, as it was alleged, sold his interest or equity of redemption to a third party, who was notified of this application, it was held that it was not necessary to notify the defendant, as the purchaser from him had been notified.

*Collins v. Denison, 465.*

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**FURTHER DIRECTIONS.***See HEARING ON FURTHER DIRECTIONS.*

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**FURTHER PRODUCTION.***See PRODUCTION OF DOCUMENTS.*

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**GARNISHEE.**

Where money, the proceeds of lands belonging to some of the defendants, had been ordered to be paid into Court to meet

a judgment held by the plaintiff against one of the defendants, and the decree directed that the plaintiff should pay to the other defendants their costs of suit; *Held*, that these defendants were entitled to a garnishee order against the money to be paid into Court.

Grant v. Kennedy, 269.

### GOOD FRIDAY.

Where notice of motion had been given of an application to commit for not bringing in accounts in the Master's office, and four days intervened between the service and the motion, one of which was Good Friday, during which the Master's office had been closed, the Secretary refused the application without costs.

Wilson v. Gould, 236.

### GUARDIAN.

On a petition for the appointment of a guardian of an infant other than his father who was living; it was held necessary that notice of the application should be served on the father.

*Re* Hendricks, 418.

### GUARDIAN *AD LITEM*.

An order appointing a guardian *ad litem* was set aside for irregularity where it was shewn that the notice of motion for the appointment did not allow the infant six weeks to appear and shew cause, but the guardian thus irregularly appointed, was allowed his costs up to decree.

Hamilton v. Hamilton, 160.

### HEARING AND EXAMINATION.

A motion was granted for postponing the hearing and examination of a cause, on the grounds of the absence of a material witness, after notice of hearing had been given, although the cause had been at issue for some months previous.

The costs of such a motion are costs in the cause.

Graham v. Machell, 376.

### HEARING CHAMBERS MOTION BEFORE A JUDGE.

When a party moving desires to have his application heard before a judge, it does not entitle him to have it heard at a future day; but it may be heard at once.

The Court will not encourage the hearing of motions before a Judge, where the object of doing so is obviously to gain time after it has been refused by the Secretary.

*Lachlan v. Reynolds*, 454.

### HEARING ON FURTHER DIRECTIONS.

In a case where fourteen days have elapsed since the confirmation of the Master's report, the plaintiff will not be permitted to set down the cause on further directions for a distant day, to the delay of the defendants. Where, under such circumstances, the cause had been set down on further directions by both parties, a motion by the plaintiff to strike the cause out of the list, the setting down by the defendant being for an earlier day, was refused with costs.

*Poole v. Poole*, 379.

### IDIOT.

*See NEXT FRIEND*, 3.

### IMMEDIATE SALE.

*See INFANTS*, 4.

### IMPRISONMENT FOR DEBT.

The provisions of the Con. Stat. cap. 26, apply to the Court of Chancery, and a debtor confined under a writ of arrest may apply for his discharge under section seven thereof.

*Lawson v. Crookshank*, 418; *S. C.* 426; *Pherill v. Pherill*, 444.

### INFANTS.

1. The solicitor of the plaintiff, in ignorance of the plaintiff's death, had, after that event, taken certain proceedings in the cause. On a motion to confirm these proceedings, it was held that no order could be made except by consent.

*Graham v. Davis*, 187.

2. Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches.

*Burke v. Pyne*, 193.

3. Where the defendant was shewn to have been an infant at the time when the note *pro confesso* was entered, such noting and all subsequent proceedings were set aside; but as the defendant was tardy in applying, and his conduct in the matters complained of in the bill censurable, the order was made without costs; and he, being now of age, was ordered to answer in a fortnight.

*Adams v. Guillott*, 427.

4. Where it appeared to be for the benefit of the infants interested, and the plaintiffs, who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants, without requiring the consent of the mortgagor.

*Cayley v. Colbert*, 431.

5. When a *prima facie* case is made, shewing that no conflicting interest exists between the infants and the proposed guardian, or the party proposing him, the Court will not go into the question of the fact or extent of interest.

*Ferguson v. Langtry*, 473.

6. The Court will exercise supervision over solicitors appointed guardians *ad litem*, and expect at their hands a proper attention to the interests of the infant parties..

*Duncan v. Ross*, 443.

7. Proceedings which a defendant allows to be taken against him after he comes of age, are binding on him.

There is no necessity for his being served with notice of the suit, after his coming of age.

A motion to set aside such proceeding as irregular and void was refused with costs; but the defendant was allowed to take an order giving him leave to falsify any of the items in the costs taxed, and accounts allowed by the Master, reserving the costs of reference.

*Lawrason v. Buckley*, 477.

8. Where in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties, was necessarily referred to a Master, the cost of such reference was ordered to be borne by the testator's estate.

*Rodgers v. Rodgers*, 241.

9. Reference to arbitration.

*Allan v. O'Neil*, 22.

10. Enquiry whether sale beneficial.

*Graham v. Davis*, 24.

11. Day to shew cause.

*Sutherland v. Dixon*, 25.

**12.** It must appear clearly that the Master reports a sale beneficial to infants before a final order for sale will be made.

*Edwards v. Burling*, 48.

**13.** Where a legacy bequeathed to an infant had been paid into Court, the interest thereon was ordered to be paid out as it accrued for the education and maintenance of the infant on its being shewn that the money was required for these purposes.

*Griffin v. McGill*, 318.

*See SECURITY FOR COSTS.—GUARDIAN.—NEXT FRIEND.*

### INSOLVENCY ACTS.

Where, previous to an act of insolvency, certain lands on which the insolvent, a defendant in a suit in Chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity; the assignee in insolvency moved that such moneys be paid into Court for the benefit of the general creditors. It was held that such lands were subject to the order for sale, and the motion refused with costs; but the assignee was allowed his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors.

*Yale v. Tollerton*, 49.

### INSOLVENT.

It is competent to a debtor insolvent, or on the eve of insolvency, to prefer one creditor to another by the conveyance, or mortgage of real estate, the same rule applies to a surety.

*Curtis v. Dale*, 184.

### INTERIM ALIMONY

*See ALIMONY.*

### INTEREST.

Where defendant had retained moneys and did not shew that he had deposited them for safe keeping, or kept them in his hands unemployed, he was held to be properly charged with interest.

*Beaton v. Boomer*, 89.

*See PURCHASER AT SALE.*

## INTERPLEADER.

1. Where a married woman claimed goods seized under a *f. fa.*, and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion.

Gourlay v. Ingram, 237.

2. Amending interpleader issue *nunc pro tunc*.

Mulholland v. Downs, 233.

3. On an application for an interpleader order it is only necessary to make out a *prima facie* case : the Court will not go into the merits of the case or try the question of ownership.

The Secretary has a discretion to grant such an order, and unless it can be shewn that no *prima facie* case was made out, it will not be set aside on appeal.

An order for an interpleader to issue had been applied for to try the right of a married woman to certain goods seized under a *f. fa.*, to which application her husband was not a party, and the motion was refused with costs. On that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application the solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband, the motion was renewed and an interpleader order granted by the Secretary, which, on appeal, was sustained.

Gourlay v. Ingraham, 238.

4. Where on an interpleader issue the amount in dispute was \$60.40, only, a verdict having been given in favor of the claimant, and the Judge of the County Court who tried the issue having certified that he was satisfied with the verdict, the Court refused a new trial, although they thought that if the case had originally come before this Court for trial on the same evidence, the opinion of the Court might have been against the claimant.

The verdict not having been endorsed on an office-copy of the order of interpleader, but on the record only, the supposed irregularity was held to be immaterial.

Where there was a variance between the issue directed by an interpleader order and the issue stated in the record, the latter being the issue which if asked, the Court would have directed : Held, that after trial no advantage could be taken of the variance.

Gourlay v. Ingram, 309.

**IRREGULARITY.**

A notice of motion on grounds of irregularity should state the grounds of the alleged irregularity.

Poole v. Poole, 379.

**JUDICIAL OPINION.**

*See PETITION UNDER ACT 29 VIC.*

**JURISDICTION.****COUNTY COURT SUIT.**

Where the plaintiff's claim on the premises, together with the amount of a subsequent mortgage, exceeded \$200, it was held to be beyond the jurisdiction of the County Court.

*Semble*, the necessity for an order for substitutional service would appear to be sufficient reason for not filing a bill in the County Court.

Seath v. McIlroy, 93.

*See ARBITRATION, 1.—IMPRISONMENT FOR DEBT.—MASTER, 3.*

**LEAVE TO ANSWER.**

*See ANSWER, 2.*

**LEAVE TO APPEAL.**

1. Leave to appeal was given to the plaintiff after the expiration of a year, where it appeared that delay had been caused by the depositions in the cause having been mislaid by one of the defendants, and where the defendants, a banking institution, had in the mean time stopped payment, and their affairs, which were very extensive, had passed into the hands of trustees ignorant of the matter.

Bank of Upper Canada v. Wallace, 169.

2. A party seeking leave to appeal, after the time limited, must account satisfactorily for the delay, and shew some reasonable grounds why such indulgence should be granted. A party will not be aided by the Court in setting up a technical defence to defeat a claim just in itself. Where leave to appeal, after the usual time was asked under circumstance which in an ordinary case would have been sufficient to sustain the application, but the case sought to be made by the appellant was *strictissime juris*, and with the view of defeating an equitable claim, the motion was refused with costs.

Gilbert v. Jarvis, 259.

3. Leave to appeal from a report was refused with costs, where it appeared that the object of the appeal was to fix executors with interest upon a sum which they invested, and upon which a loss occurred.

*Coates v. McGlashan*, 218.

4. Leave to appeal after the time limited by the orders will not be granted, except under special circumstances and on a strong case accounting for the delay.

*Denison v. Denison*, 333.

5. On a motion for leave to appeal against a Master's report after the fourteen days given by the general orders, it is not necessary to state in the notice of motion the points on which the party desires to appeal, provided they appear in the papers filed in support thereof.

*Romanes v. Hernes*, 363.

*See APPEALING.—APPEAL FROM MASTER'S REPORT.*

### LEAVE TO REHEAR.

*See REHEARING.*

### LEGATEES.

*See PARTIES.*

### LETTERS ROGATORY.

Letters rogatory, such as are provided for by an Act of Congress of the United States as issuable from any foreign Court, will be issued by the Court here, although in the present state of our law no reciprocal accommodation can be afforded here to suitors in the United States.

In letters rogatory so issued here the usual offer to render similar service when required was necessarily omitted.

Such letters need not necessarily be in the name of the Sovereign, but were issued as from the Judge of the Court of Chancery.

*United States v. Denison*, 176.

### LIS PENDENS.

The only way of getting rid of a *lis pendens* is to obtain an order dismissing the bill.

*Graham v. Chalmers*, 53.

## LUNATIC.

1. The recognition of the committee of a lunatic or of a receiver will not be deemed sufficient security under the statute.

*Re Ward*, 188.

2. Where the heir-at-law or next of kin of a lunatic are unknown, or reside at a distance, and service on them would be attended with great expense, the Court may, in a proper case, dispense with service of notice on them.

*Re McGrath*, 435.

3. Notice of motion to declare a person a lunatic and to apply the estate of an alleged lunatic to his maintenance, &c., in a lunatic asylum, should be served on the lunatic personally, if it is practicable to do so, without danger to his health or state of mind. Where, therefore, a notice of such a motion had not been served, on the ground that doing so would be useless in consequence of the state of the alleged lunatic, the Secretary directed that some medical man, other than the physician of the asylum, should visit the asylum and give evidence as to the state of the lunatic, and whether service could be effected on him.

*Re Mein*, 429.

4. On an application to declare a person a lunatic without commission, an affidavit by an officer of a lunatic asylum that the alleged lunatic is in such a state of mind as that service on him would be dangerous and prejudicial to him, will not be held sufficient to dispense with personal service on him.

Where, however, such affidavit was corroborated by others, and it was evident the party was a dangerous lunatic, personal service on him was dispensed with.

*Re Newman*, 390.

5. The Court will exercise a wide discretion as to the disposition of lunatic's estate, and when it appears to be necessary for the benefit of the estate will order its sale and disposition, and authorize the committee to collect rents, &c.

*Re Keenan*, 492.



## MARRIED WOMAN.

An application for an order to serve a married woman as if a *feme sole*, and for an order for substitutional service upon her for her husband who could not be found, was refused, he not being shewn to be out of the jurisdiction.

*Meyers v. Barker*, 407.

**MASTER.**

1. The Master has no authority to make an allowance not directed by the decree, however reasonable it may appear to him to be : his proper course is to report the circumstances specially ; and the party claiming to be entitled can apply to the Court on further directions. .

**Fielder v. O'Hara, 255.**

2. Under a decree for account, it is the duty of the Master to find whether a defendant is or is not chargeable as for wilful default, if the question arises without any directions in the decree to that effect. Where, therefore, a Master reported only that rents and profits had come to the hands of the defendant, and after stating a number of facts, submitted to the Court whether he should or should not be charged, the matter was referred back to him to complete his report.

It is not competent to a Master to abstain from deciding any question, properly coming before him for his decision.

**Walmsley v. Bull, 344.**

3. The Master has jurisdiction in matters in his own office, and will not be interfered with on a motion in Chambers. An order to be directed to him to deliver up books, &c., in his hands was refused.

**Nelson v. Gray, 454.**

**MASTER'S CERTIFICATE.**

A Master's certificate should follow as nearly as possible the accustomed form : where it does not, it will be assumed that the Master means to report specially.

**Sutherland v. Rogers, 191.**

**MASTER'S REPORT.**

1. A motion to refer a report back to the Master, will not be entertained in Chambers, although the Master certified that he had made a mistake.

**Bentley v. Jack, 473.**

2. A motion to refer a report back to the Master will not be entertained in Chambers, even on consent.

**Graham v. Godson, 472.**

3. Order made to refund money overpaid in consequence of a mistake in the Master's report.

**Bank of British North America v. McDonald, 88.**

**MINORS.***See TITLE.***MORTGAGOR AND MORTGAGEE.**

A mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due, and a bill to foreclose which has been filed.

*Green v. Adams, 134.**See TITLE DEEDS.***MOTION FOR ORDER TO EXECUTE DEED.**

An application for an order to compel a party to execute a deed directed to be executed, should be on notice, and will not be granted *ex parte*.

*Westmacott v. Cockerline, 442.***MOTION MADE BY LEAVE OF JUDGE.**

It is no objection to a motion made by leave of a Judge, that the name of the Judge granting leave is not given in the notice of motion.

*Lindsey Petroleum Co. v. Hurd, 387.***MOTION TO COMMIT.**

1. Service of notice of motion to commit on the solicitor of the party charged with contempt, is good service.

*Gourlay v. Riddell, 158.*

2. A motion to commit must be made on four days notice. Where, therefore, an application for an order to put in a better affidavit on production or be committed was made on two days' notice, the Secretary refused the motion.

*Broughall v. Hector, 434.**See NOTICE OF MOTION TO COMMIT—PRODUCTION OF DOCUMENTS.***NEGLIGENCE.***See SOLICITOR, 381.***NEXT FRIEND.**

1. When a bill is filed by a next friend, if he is not a person of substance, the plaintiff will be required to give security for costs.

The proper order in such case seems to be to stay proceedings until the next friend is changed or security given.

*Leishman v. Eastwood, 88.*

2. A motion to change a next friend must be on notice.

*Eastman v. Eastman*, 183.

3. The next friend of an idiot stands in the same position as the next friend of an infant, and is not required to establish his solvency or give security for costs. Where, however, in the bill, the description and residence of the next friend was not given, the Secretary ordered amendment to be made within a week, giving the residence and description, or the defendant to be entitled to security for costs.

*Sharp v. Sharp*, 244.

4. *Semblé*. If the next friend of a married woman makes the necessary affidavit of justification, swearing that he is worth £100 over his debts, the question of his solvency will not be gone into.

*McBean v. Lilley*, 247.

*See also SECURITY FOR COSTS.*

### NEW HEARING.

Where the defendant's solicitors, through the neglect of their clerk, were not aware until after the hearing that the cause had been set down or notice of hearing served, and the question raised by the answer was as to the defendant's liability on a judgment recovered against him by his solicitor, the Court allowed a new hearing after the decree was drawn up and entered, on payment of costs.

The application for such a purpose should be by petition to the Court, and not by motion in Chambers.

*Donovan v. Denison*, 284.

### NON-ATTENDANCE OF PARTIES.

On an application that a witness be ordered to attend before a Master or examiner at his own expense, the evidence of his default should shew that he was duly subpœnaed, the certificate of the Master or examiner that evidence of the service of subpœna had been produced before him, will not be held sufficient.

*Waddell v. McGinty*, 442.

### NOTICE.

Four days notice must be given of a motion to commit.

*Gray v. Hatch*, 12; *Broughall v. Hector*, 434.

*See LUNATIC, 2, 3.—GUARDIAN.—MOTION FOR ORDER TO EXECUTE DEED.*

**NOTICE OF MOTION.**

Where an affidavit refers to a document and notice of reading such affidavit is given, the document (in this case the endorsement on the office-copy of a bill) may be read without special reference to it in the notice.

*Johnson v. Ashbridge*, 251.

*See LEAVE TO APPEAL*, 5.

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**NOTICE OF MOTION TO COMMIT.**

1. The notice of motion to take an affidavit on production off the files, and to commit for contempt should be served on the defendant's solicitor and not on the defendant personally.

Motions for order to commit for non-production are properly made in Chambers.

*Ross v. Robertson*, 66.

2. On a motion to commit for non-production of certain documents after an insufficient affidavit on production, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced though the Court considered such the better course. On such a notice the Court will grant the lesser relief, and order further production, but without costs.

*Fisken v. Smith*, 491.

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**OFFICE-COPIES.**

Order 79 applies only to copies order to amend, not to office-copies of bill.

*Tyron v. Pears*, 470.

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**OFFICE-COPIES AFFIDAVITS.**

If office-copies of affidavits are demanded, it is imperative on the parties filing the affidavits to furnish them; and the costs of any delay occasioned by his not doing so falls on the party making such default.

*Burrowes v. Hainey*, 186.

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**OFFICE-COPY BILL.**

The indorsement on an office-copy bill must specify distinctly which relief the plaintiff seeks, whether sale or foreclosure.

*Drewry v. O'Neal*, 204.

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**OFFICE-COPY PLEADINGS.**

The order to furnish office-copy pleadings when demanded is imperative, and the Court will enforce compliance with it.

*Totten v. McIntyre*, 80.

## OPENING BIDDINGS.

1. An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shewn on the part of the purchaser.

Crooks v. Crooks, 29.

2. Where the title or proof of it is involved in no difficulty, a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deed, or copies thereof, other than such as are in his possession, or procure any abstract" was held to be very objectionable, and should not be sanctioned by Masters even by consent.

McDonald v. Gordon, 125.

3. Biddings will not be opened and a sale set aside on the grounds that a party (the defendant) was prevented from bidding by promises made to him by the purchaser; such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit.

Brock v. Saul, 145.

## OPENING FORECLOSURE.

1. A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time, also, that he has a prospect of paying the mortgage debt if time be given him, and that the property is of much greater value than the amount due.

Johnson v. Ashbridge, 251.

2. The Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches and shews no efforts made on his part to avoid foreclosure or save his estate.

Brothers v. Lloyd, 119.

3. Suing at law for part of the mortgage money, for which the note of a third party had been given as collateral security, will not open the foreclosure, if such suit is brought before foreclosure completed.

On a motion for delivery of possession, the Court will not as a general rule look behind the final order for foreclosure.

Mills v. Choate, 374.

4. The recovery of a judgment against the defendant after a final order of foreclosure, has the effect of opening the foreclosure and letting the defendant in to redeem.

In such a case the Secretary made an order giving time for redeeming, that part of the order being acquiesced in; putting the defendant on terms to pay subsequent interest and costs, and that writ of assistance issue without further order if default made in payment at time named.

Mills v. Choate, 433.

**ORDER TO PRODUCE.***See PRODUCTION OF DOCUMENTS.—SUBPOENA.***ORDER TO REVIVE.**

1. Where an order to revive is obtained to add a party who is an assignee of the defendant, it is not necessary to describe him in the order as assignee. If an order is complained of as irregular, it is not competent to the opposite party to move to amend or alter it: his course is to move to set it aside, and this must be done within the time limited by the orders regulating the practice.

*Brigham v. Smith, 257.*

1. Order of revivor improperly obtained on præcipe, set aside on terms, notwithstanding delay in making the application.

The defendant, though aware that A. had no interest in the matters in question, made him a party by order of revivor obtained on præcipe. A. was then, and for some time afterwards, under the belief that he had been made a party properly, and, even after he had found out that he had been made a party improperly, he did not apply to have the order of revivor set aside as against him, till he found that he was prejudiced by it, he then petitioned to have the order set aside as against him, and the Court granted the application on the terms of his paying the costs of the petition and any costs that had been incurred by his having been made a party.

*Smith v. Gunn, 230.*

3. When a suit becomes defective, and is proceeded with without an order to revive being taken out, a subsequent application, by petition, to supply the defect by adding parties is not improper; but the new parties may not be bound by the proceedings in their absence.

*Peck v. Bucke, 294.***ORDERS.**

A direction to do an act "forthwith" is a sufficient compliance with Orders 288 and 293.

*Wallace v. Acres, 392.***Orders 40 and 41.***Coates v. Edmundson, 439.***Order 79.***Tyron v. Pears, 470.*

## PARTIES.

1. Legatees are not necessary parties defendant to an administration suit.

Harrison v. Shaw, 44.

1. When a judgment has been recovered *pendente lite*, it is not necessary to make the judgment creditor a party.

Wallbridge v. Martin, 275.

3. A bill was filed to administer an estate and declare a legacy for religious purposes void. The trustees were made defendants; but a question arose whether the Attorney General ought not also to have been made a defendant:

*Held*, that the Attorney General was a necessary party.

Long v. Wilmotte, 87.

Where the parties who would become interested under a decree as kin of a testator are very numerous, and difficult to serve, the Court will, in its discretion, dispense with service on them, or some of them, and direct one of a family or class to be served.

Anderson v. Kilborn, 408; see also Rogers v. Wills, 13.

See AMENDING, 3.

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PAYING MORTGAGE MONEY OUT OF COURT.

Where defendant refused to consent to payment out of mortgage money, plaintiff obtained an order for such payment, but at his own expense.

Barnard v. Alley, 91.

2. A power of attorney, or other written authority, is necessary to authorize the payment of money out of Court to the solicitor, even though the parties to whom it is coming are numerous and not resident in America.

The additional circumstances of the money having been realized from the sale of property mortgaged to secure negotiable debentures, which were in the possession of the solicitor since the institution of the suit, *held* not to dispense with the necessity for a power of attorney.

Swan v. Marmora Iron Works Co., 155.

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PAYMENT OF MONEY.

Where money collected by the sheriff had been posted on the evening of the 27th November, addressed to the plaintiff's solicitor, but not received by him till after the defendants had moved for a stay of proceedings.

*Held*, that the money was constructively in the possession of the plaintiff's solicitor as soon as it had been duly mailed ; and therefore a motion to refund it was refused with costs.

McDonell v. McKay, 354.

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#### PETITION OF REVIEW.

The Court has jurisdiction in a proper case to entertain an application by a party served with an office-copy of the decree, under the general orders of June, 1853, (No. 6, rule 6) after the expiration of the 14 days thereby limited.

To support an application after the time limited for leave to file a petition of review, the longer the delay has been and the less satisfactorily it is explained, the stronger the case should be on the merits ; where, after five months' delay, an application was made to impeach the will on which the decree was founded, and the application was supported by affidavits of belief only, in addition to statements which though uncontradicted would not be sufficient to avoid the will, the Court refused the application with costs.

Stewart v. Hunter, 265.

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#### PETITION UNDER 29 VIC., CH. 28, SEC. 31.

An administrator was desirous of converting saw logs into lumber for the benefit of the estate he represented. An application under 29 Vic. ch. 28, sec. 31, was entertained and an opinion of a judge given in favour of the course suggested.

Re Caldwell Estate, 150.

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#### PLEADING.

On a question arising on demurrer as to whether a bill to redeem should contain an offer to redeem. Mowat, V.C., decided that it need not.

• Pearson v. Campbell, 12.

*See BILL.*

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#### POSSESSION.

1. On moving for an order for delivery of possession it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause.

McKenzie v. Wiggins, 391.

2. General Order 454 applies only to mortgage cases, and not to suits for specific performance.

*Chisholm v. Allen*, 411.

3. Where costs were not asked for by the notice on an argument, and no demand of possession was proved, the order for delivery of possession was made without costs.

*Mills v. Choate*, 374.

4. A motion for delivery of possession must be made on notice.

*Buckley v. Ouillette*, 439.

*See DELIVERY OF POSSESSION.*

#### POSTPONING HEARING.

1. When a motion to postpone the hearing of a cause was made before the Secretary on the same day the cause was to be heard in an outer county, he refused the application.

*McEwan v. Orde*, 280.

2. It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, costs in the cause.

The engagements of a witness who was a Senator of the Dominion and a member of the Executive Council at his duties at Ottawa, where the Senate was in session, were deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing.

*Rees v. Attorney General*, 386.

3. A motion was granted for postponing hearing and examination on the grounds of the absence of a material witness, after notice of hearing had been given, although the cause had been at issue for some months previous. The costs of such a motion are costs in the cause.

*Graham v. Machall*, 376.

4. When a commission to take evidence abroad could not be executed in time, by reason of the illness of the commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing.

*McIntyre v. Canada Company*, 464.

#### PRINCIPAL AND INTEREST.

*See RECEIVER.*

#### PRIVILEGED COMMUNICATION.

*See PRODUCTION OF DOCUMENTS.*

*PRO CONFESSO.*

1. To obtain an order to vacate an order *pro con.* and decree, a very clear case must be made.

*Bank of Montreal v. Wallace*, 17.

2. After a lengthy period has elapsed since the day appointed for payment, it is necessary to give notice of the motion to take *pro con.*

*Kirchoffer v. Stafford*, 52.

3. The report of the Master must be filed before the day appointed for payment.

*Mills v. Dixon*, 53; see also *Richardson v. Beau-pré*, 54; and *Marshall v. Balfour*, 69.

4. A note *pro con.* was set aside where the affidavit of service of office-copy bill was shewn to be imperfect and insufficient.

*Gordon v. Johnson*, 210.

5. It is irregular to take an order *pro con.* where *pro con.* note stands in the Registrar's books unvacated.

Strict service of an office-copy of the bill duly stamped will be required before an order *pro con.* can regularly issue.

*Cameron v. Upper Canada Mining Co.*, 215.

6. An order will not be made to take a bill *pro con.* against a married woman without her having had an opportunity to answer separately.

*White v. Church*, 203.

7. Where defendants made a proposal for settlement before answer, and there was no promise or proposal to extend the time for answering during the pendency of the negotiation.

*Held*, that there was no irregularity in the plaintiff's noting the bill *pro con.* at the expiration of the time for answering.

Where defendant obtains an order for security for costs, it is not necessary to file affidavits shewing that the order has been complied with before the bill is noted *pro conf.*

*Bolster v. Cochrane*, 327.

8. It is the proper practice for the Deputy Registrar to note the bill *pro con.* when the bill has been served within the jurisdiction.

*Procter v. Dalton*, 470.

9. A motion under Order 144, Consol. Orders to have the bill taken *pro con.* will not be granted *ex parte.*

Richards v. Richards, 283.

*See ANSWER, 2.—SERVICE, 5.*

### PRODUCTION OF DOCUMENTS.

1. A plaintiff is not bound by the defendant's view of the relevancy or otherwise of papers he seeks to have produced, and, though defendant swears positively that the papers have no bearing upon the case made by the bill, the Court will order their production,

Saunders v. Furnivall, 49.

2. A party parting with papers, after service upon him of an order to produce, was ordered to produce them, to file a better affidavit and to pay costs.

Ross v. Robertson, 66.

3. Letters passing between agents of a party to the cause, although written as between themselves in confidence, are not privileged communications, or protected from discovery; such letters are considered in the custody or power of the party in whose interest they are written, and must be produced.

Such party cannot withhold part of their contents by cutting out portions of the letters.

Wiman v. Bradstreet, 77.

4. In a case between vendor and purchaser, where a defendant was called on to produce a certain letter which he refused to produce on the grounds "that the same is and contains an opinion from the said McGrath, who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my solicitor, relating to my said title." It was held to be a privileged communication, and a motion to commit for noncompliance with a notice to produce was refused with costs.

Wilson v. Brunskill, 147.

5. Where a party admits documents in his possession, he is *prima facie* bound to produce them, or assigns a sufficient reason why he should not.

But where a party refers in his bill to documents which, otherwise, he would not be liable to produce, he does not by so doing, create a liability to produce them.

Green v. Amey, 138.

6. Where books were in actual use by defendant, the Court refused to order him to make verified copies of entries relative

to matters in question for use of plaintiff: but where it was sworn on the part of the plaintiff, and not denied by defendant, that the latter had documents so relating which were not mentioned in his affidavit, he was ordered to produce them.

*McDonell v. McKay*, 141.

7. Where a bank agent refused to produce on the ground that he had no documents in his possession, but as such bank agent, it was held that he ought to set out in his affidavit, what documents were so in his possession; and it appearing from his answer that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause.—*Il.*

8. An order to produce cannot regularly be taken out after decree; and an order so taken out on *præcipe* was set aside with costs.

*Cottle v. Vansittart*, 396.

9. A party called on to produce documents must state distinctly in his affidavit on production, what are the documents he seeks to protect, and the grounds on which he claims them to be privileged.

*Wright v. Western Insurance Co.*, 403.

10. Where documents are in the custody of the Deputy Registrar in another cause, and are required at the hearing, an order for their production will be granted *ex parte*.

*Gainer v. Doyle*, 279.

11. The Deputy Registrar will be ordered to attend at trial with papers in his custody. But to obtain such an order it should be shewn that the papers required are the original documents, and that the production of office-copies will not be sufficient.

*Chadwick v. Thompson*, 389; see also *Jay v. McDonell*, 71.

*See NOTICE OF MOTION TO COMMIT.*

#### PURCHASER AT SALE.

A purchaser at a sale under order of this Court was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he was in no way responsible, such delay, however, not being caused by any fault of the vendors: the condition of sale stipulating for the payment of interest from the day of sale.

*Sembler*, in the absence of such stipulation in the conditions of sale, the Court would relieve the purchaser from the pay-

ment of interest where the delay was not of his causing. Such a stipulation in the conditions of sale is not to be approved of.

*In re Thompson, Biggar v. Dickson*, 196.

*See PLEADING.*

### QUALIFIED ALLEGATIONS.

On demurrer *ore tenus* held that every material allegation in a bill must be positive.

*Yarrington v. Lyon*, 22.

### QUIETING TITLES, ACT FOR.

1. Where it was shewn that an erroneous certificate had been issued, but not registered, and no deed or incumbrance since made affecting the land, a motion on petition that a proper certificate issue was granted *ex parte*.

*Bradley v. McDonell*, 274.

2. The certificate to be produced from the County Registrar as to the state of the registered title, must shew what memorials were registered up to the time of registering a certificate of the filing of the petition.

The liabilities of parties insured in Mutual Insurance Companies is a charge on the property insured; and an affidavit is necessary stating that there is no such policy in existence, or that the policies named are the only ones in existence.

It is necessary to shew that the notices posted at the Court House and nearest Post Office were continued for the period directed by the referee. When, a year after the testator's death a petition for a certificate was filed on the part of his devisees, notice was required to be given to the heirs or some of them.

*Ex parte Hill*, 348.

3. The effect of a certificate under the Act is so stringent that great particularity must be exercised by the Court in seeing that all parties entitled to notice have been duly and regularly served, and that strict proof of such service be given.

The entry in a docket of a deceased solicitor stating service of a notice of application, was considered insufficient evidence of notice having been given to all the tenants entitled to notice.

*Ex parte Palmer*, 351.

4. Under the Act for Quieting Titles, every material fact which is capable of being proved by independent evidence, ought to be proved : thus it is necessary to prove search for missing deeds ; an affidavit by petitioner himself of search for such deeds is insufficient.

Where a title by possession is relied on by a petitioner under the Act, notice of his application must, under the direction of the referee, be given to the persons who, but for such possession, would be the owners, unless it has been shewn that due enquiry has been made for such persons without success.

The Court has no jurisdiction to grant a certificate unless all taxes except those for the current year have been paid.

*Ex parte Chamberlain, 352.*

5. Proof is indispensable either that possession has always accompanied the title under which petitioner claims, or that some sufficient reason exists for not adducing such proof.

Where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, the Court called for explanations, as it was necessary to take care that the Act was not being made use of for any improper purpose, such as defeating the creditors of the owner by getting the title of a voluntary grantee quieted before the creditors are aware of the attempt to defraud.

*Ex parte Wright, 355.*

6. Where property is claimed by or on behalf of a wife under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to shew that it was *bona fide*, and was such that the husband's creditors could have no claim on the property : the affidavits for this purpose should be by the petitioners, and should be satisfactorily corroborated by disinterested persons of known credibility.

Where the petitioner claimed the north-east part of a lot under a will devising the north-west part, and it was alleged that the word "north-west" was a clerical error in the will, all the parties interested in the opposite view were required to be served with a notice of the application signed by the referee or inspector, unless a case should be made for dispensing with service on some of them.

Where the petitioner's title was acquired within two years before the filing of the petition, the Sheriff's certificate was required as to executions against the prior owner, as any such executions, if duly renewed, might be binding upon the land.

*Ex parte Lyons, 357.*

### RECEIVER.

Where a receiver had made an investment unauthorized by the Court, by which a profit had been made, the amount realized was directed to be added to the principal.

*Baldwin v. Crawford*, 9.

The recognizances of a receiver will not be deemed sufficient security under the Statute.

*Re Ward*, 188.

### REDEMPTION.

Where there were several defendants interested in the equity of redemption of certain property, and one purchased up several outstanding shares of co-devisees also interested, and so dealt and acted that the other parties interested assumed that he intended to redeem for their mutual benefit, instead of which he arranged with the mortgagee to suffer foreclosure and then bought from him, it was held that he could properly do so for his own sole benefit.

*Ruttan v. Levisconte*, 108; see also *Ardagh v. Wilson*, 70.

### REFEREE.

His jurisdiction as to costs, &c.

*In re Lot B*, 8th Con., Enniskillen, 22.

### REFERENCE TO ARBITRATION,

By infants.

*Allan v. O'Neil*, 22.

### REHEARING.

1. Leave to rehear was given when the time for rehearing expired a few days before rehearing term, and the delay had not really affected the progress of the cause, there having been no sittings to rehear causes in the interval.

*Stevenson v. Nicholl*, 183.

2. A motion for leave to rehear the cause after the time limited for rehearing has expired may be made *ex parte*.

*Dickson v. Burnham*, 436.

### RELEASE BY MARRIED WOMAN.

*See DOWER.*

**RELIEF.**

Relief granted to a party who appeared only to shew cause.  
*Mulholland v. Downs*, 288.

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**REPORT.**

*See MASTER'S REPORT.*

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**RESTORING DISMISSED BILL.**

1. A motion to restore a bill dismissed for want of prosecution was refused where great delay had taken place on the part of the plaintiff.

*Davey v. Davey*, 26.

2. A bill properly dismissed for want of prosecution will only be restored under strong and special circumstances. Where an injunction bill has been dismissed, which had been filed to restrain proceedings at law, and judgment at law had been confessed on obtaining the injunction and afterwards on dismissal of the bill, money paid under the pressure of the judgment which it was now alleged was in excess of any due; a motion to restore the bill and take accounts between the parties was refused.

*Hodgson v. Paxton*, 398.

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**RETAINING FEE.**

1. A retaining fee to a solicitor is not taxable.

*Cullen v. Cullen*, 94.

2. No retaining fee will be allowed to a solicitor who is himself also counsel.

*In re McBride, Farley v. Davis*, 153.

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**RETAINER.**

If a firm, consisting of two or more partners, is retained, and one dies, it will be assumed that the retainer continues to the surviving partner or partners.

*Alchin v. Buffalo and Lake Huron R. W. Co.*, 45.

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**REVIVOR.**

*See DISMISSING BILL.—ORDER TO REVIVE.*

## SALE.

1. It must appear clearly that the Master reports a sale beneficial for infants before a final order for sale will be made.

*Edwards v. Burling*, 48.

2. Where a debtor dies intestate, and his lands are sold under execution against his heir for the private debts of the heir, and the purchaser has notice before his purchase that there are debts of the ancestor outstanding, of which the creditors claim payment out of the lands seized, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts.

*Peck v. Bucke*, 294.

3. Where an irregularity had occurred in advertising a sale, but no injury had thereby accrued, and a fair price had been obtained, the Court confirmed the sale.

*Cayley v. Colbert*, 455.

4. The Secretary in Chambers will not entertain a motion to confirm a sale where an irregularity has occurred, unless the sale has been approved of by the Master.

*Thomas v. McCrae*, 456.

5. A sale will not be ordered until the mortgagor has had the usual time to redeem.

*Trust and Loan Co. v. Reynolds*, 41.

6. The principle upon which sales under decree of Court should be conducted, considered, and commented upon.

*McDonald v. Gordon*, 125.

*See SETTING ASIDE SALE.*

## SECURITY.

The recognizance of a committee of a lunatic, or of a receiver, will not be deemed sufficient under the Statute.

*Re Ward*, 188.

## SECURITY FOR COSTS.

1. A plaintiff will be ordered to give security for costs where it is shewn that he is insolvent and is carrying on the suit for the benefit of another party, who seeks to escape the risk of costs.

*Mason v. Jeffrey*, 15.

2. The next friend of a married woman, who is co-plaintiff with her husband, will be required to give security for costs if it appears that he is a person of no known means, and his residence not known, though it appears that the husband has a substantial interest and is not a mere formal party to the suit,

*Vanwinkle v. Chaplin*, 98.

3. If a plaintiff, residing out of the jurisdiction, is shewn to have property in Upper Canada, an order for security for costs made against him will be set aside.

*Galt v. Spucer*, 92.

4. In bonds for security for costs of appeal, there should be two sufficient sureties, and, if one dies or becomes insolvent, another will be ordered to be substituted. *Brigham v. Smith*, 1 Cham. Rep., 334, overruled.

*Saunders v. Furnivall*, 159.

5. Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security for costs will be ordered to be given, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and it is not shewn positively where he is resident.

*Somerville v. Kerr*, 168.

6. Where plaintiffs, who were resident out of the jurisdiction, had paid a certain sum into Court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated.

*Luther v. Ward*, 175.

7. To bring a case within the Statute 29 & 30 Vic. ch. 24, requiring security for costs to be given where another action for same cause is pending, it must be clearly shewn the causes of action are identically the same, and not merely growing out of the same transaction.

And *quære*, does the Act apply at all to this Court, or where one action is at law and the other in this Court.

*Dean v. Lamprey*, 202.

8. Where, on a petition against a solicitor for an account, it was alleged and not denied, that he had large sums of the client's money in his hands, and the petitioner, though resident in a foreign country, was relieved from giving security for costs.

The rule requiring security for costs is not so positive and inflexible but that the Court will relax it in their discretion, when the circumstances of the case require it.

*Re Carroll*, 305.

9. Where defendants took separate orders for security for costs, and the plaintiff obtained an *ex parte* order giving him liberty to pay \$400 into Court, instead of filing security by bond, the money so paid in was *held* to be security for all defendants, though the order recited one only of the orders for security.

Bolster v. Cochrane, 827.

10. Where the next friend of a plaintiff has become insolvent and left the jurisdiction, the proper order to be made is, that proceedings be stayed until a solvent next friend be appointed, or until security for the costs be given.

McGody v. Maladay, 487.

11. Security for costs must be applied for before the time for answering has expired.

The filing of an answer is a waiver of any claim for security for costs.

Smith v. Day, 456.

12. A next friend is liable for costs incurred while acting as such next friend, and not for other or past costs.

Where a next friend has been appointed, who proved to be an infant, and a new next friend was consequently appointed, an application to make the new next friend liable for the costs incurred before his appointment, was refused.

Poole v. Poole, 459.

13. Where it becomes necessary to substitute a new next friend, the motion for the appointment should be on notice, and an order taken on *præcipe* is irregular. An order so taken was set aside with costs on the grounds of irregularity, and without going into the question of the solvency of the party appointed.

Bennett v. Sprague, 194.

14. An infant, out of the jurisdiction, petitioning for relief, will be required to give security for costs.

Stinson v. Martin, 86.

*See Costs.—PRO CONFESSO, 9.—DISMISSING BILL, 9.*

### SEQUESTRATION

1. A writ of sequestration cannot regularly be issued on *præcipe*. Before such writs can be regularly issued, the order for the payment of the money must be served, and an affidavit of such service and of the non-payment filed.

A writ issued on *præcipe* was set aside, but without costs.

Fiskin v. Wride, 212.

2. Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn ; but, where the tenant having been notified by the sequestrator, promised to pay him the rent in future, and afterwards, on being indemnified, paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator.

Harris v. Meyers, 121.

3. Although, as was held in *Fiskin v. Wride*, a copy of the decree or order, directing the payment of the money, should be shewn to have been served and a demand of payment of the money made, before a writ of sequestration can properly issue ; yet where, as frequently has been done, a writ was issued without an affidavit filed shewing such service and demand, and the defendant had been aware of it for upwards of a year, and had appeared on a motion to compel a tenant to attorn, it was held, that he had waived any objection, and a motion to set it aside was refused.

Harris v. Meyers, 248.

## SERVICE.

1. Where a married woman who had received an office-copy bill and order to answer separately by mail, accepted service in writing, and returned the acceptance endorsed on the original order, it was held to be sufficient.

Kearchie v. Buchanan, 42.

2. Service out of jurisdiction.

Woodside v. Street Railway Co., 24.

3. The service on a grown-up person must be at defendant's residence, and such person must be a resident there.

Elliott v. Beard, 80.

4. A solicitor's bill need not necessarily be served personally. Service on one of several clients, acting in conjunction by the same solicitor, but not co-partners, is sufficient service on them all.

Service on a solicitor appointed by one of several clients who had been active in the suit, and through whom instructions therein had been given, was deemed good service.

Re Morphy & Kerr, 82.

5. A warrant requires two days clear service.

Sutherland v. Rogers, 191.

6. In mortgage suits, where the bill has not been personally served, it is not the proper practice to move for allowance of service. An order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*. The decree in such cases is now made in Court, not upon *præcipe*.

Glass v. Moore, 327.

7. Where, after an irregularity of service, the party having the right to insist on it, serves a demand which it would put the other party to expense to fulfil, it waives the irregularity.

Carpenter v. The City of Hamilton, 282.

8. A written admission of service, and that the party making it was the defendant in the bill, made by a defendant served in Montreal, was received as sufficient proof of service, on an affidavit being filed of a party within the jurisdiction, proving the handwriting.

Erle v. Hunt, 395.

9. The mere fact of a defendant residing in England, is not sufficient ground for dispensing with personal service of an office-copy bill.

Everest v. Brooks, 445.

10. Service on the agent of the solicitor who had acted in the cause for defendant, was held good service, although the solicitor had been changed; but no order for changing the solicitor had been taken out.

Brown v. Burgar, 446.

11. Under peculiar circumstances, accounting for the delay, service of an office-copy will be allowed, although the time limited by the orders for service (twelve weeks) has elapsed.

Brooke v. Nimeas, 461; see also Gourlay v. Riddell, 158; Broughall v. Hector, 432; Bolster v. Cochrane, 327; *Re Newman*, 390; *Re Hare*, 417.

*See AMENDING, 4.—LUNATIC, 3.—GUARDIAN.*



## SERVICE OF DECREE.

*See PETITION OF REVIEW.*

**SETTING ASIDE ORDER.**

An *ex parte* order will not be set aside because it is not entered.

McEwan v. Orde, 278.

**SETTING ASIDE SALE.**

The "highest bidder" at an auction sale is the "purchaser" under the General Orders of the Court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position.

The omission in an advertisement of sale to state that the premises are leased advantageously, will afford good grounds for staying the sale, but an application for such purpose should be made promptly and before sale.

Where the plaintiff, who had the conduct of the sale, assigned his interest, and an order to revive, making the assignee a party, was, a few days before the sale, taken out, but not served, and an order taken to substitute for the plaintiff's solicitor, the solicitor for the assignee, and the case went on under the control of such new solicitor, the Court set aside the sale, although reluctantly, as great delay had been shewn on the part of the mortgagor in making the application, and he was, under the circumstances, ordered to pay the costs incurred by the new sale.

McAlpine v. Young, 171.

**SETTLING ADVERTISEMENT.**

*See SETTING ASIDE SALE.*

**SHERIFF, AMENDING RETURN.**

A Sheriff in his advertisement of sale of lands seized under a *fi. fa.* from this Court, had described them as the lands of the defendant, when they were those of the plaintiff; on an application on notice, this return was allowed to be amended on payment of costs of the motion.

McCann v. Eastwood, 182.

**SIGNATURE TO INFORMATION.**

There is no precedent for dispensing with the signature of the Attorney General to an information.

Where, in the absence from the province of the Attorney General, an information was filed without signature, but having endorsed thereon a fiat signed by the Solicitor General, it was ordered to be taken off the files.

Attorney General v. Toronto Street Railway, 165.

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SOLICITOR.

1. A party alleged that he had been induced by the plaintiff's solicitor to allow his name to be used as next friend, on the assurance that he would not be rendered liable to costs; this was denied by the solicitor. It was considered that such a fact could not be established by *ex parte* affidavits.

Burgess v. Mumma, 43.

2. A solicitor may be changed without an order in our Court: it is otherwise in England.

Bailey v. Bailey, 57.

3. A client is bound by a consent of his solicitor entered into in good faith.

*Ib.*, 58.

4. A solicitor should not treat with a party to a cause in the absence of the solicitor of such party;

Bank of Montreal v. Wilson, 117.

5. The Court of Chancery will exercise a summary jurisdiction over solicitors of that Court and order them to pay over moneys of clients in their hands. Where, therefore, it was shewn that a client had paid his solicitor \$1800 to be applied in carrying out an agreement to purchase entered into by him, and which, they informed him, they had paid into Court, but had not done so, they were ordered to pay the amount in ten days.

It being shewn also, that a bill for specific performance, instituted by them as his solicitors to enforce the said agreement, had been dismissed with costs for want of prosecution, owing to the default of said solicitors: the costs so paid were not included in the above mentioned order, but the client was left to his action at law; so also with respect to money paid to the vendor and lost by the negligence of such solicitors, and money paid to them on account of their own costs.

*Re Toms & Moore*, 381.

6. Where a solicitor appeared to represent parties who had been served with notice, being claimants in the Master's office,

but were not the least interested in the question then at issue, and asked for costs; the Court regarded his conduct "such as ought to be discouraged by this Court," and refused him costs.

*Simpson v. Ottawa Railway Company*, 226; see also *Re Carroll*, 305; *Re Walker*, 324; *Re Toms*, 381.

### SOLICITOR AND CLIENT.

1. Where the defendant's solicitors, through the neglect of their clerk, were not aware till after the hearing, that the cause had been set down, or notice of hearing served, and the question raised by the answer was as to defendant's liability on a judgment recovered against him by his solicitor; the Court allowed a new hearing after the decree was drawn up, and entered on payment of costs.

The application for such a purpose should be by petition to the Court and not by motion in Chambers.

*Donovan v. Denison*, 284.

2. A solicitor is liable to account for moneys or securities in his hands, under the summary jurisdiction of this Court, although such moneys or securities may have come to his hands as an agent for the owner, and not strictly in his character of solicitor or attorney or involved any duty as such in the holding or possession of them.

*Re Carroll*, 223.

3. Where the affidavit, on which a motion to review was grounded, contained allegations of misconduct on the part of the solicitor altogether unconnected with the dealings between the solicitor and client, such allegations were held to be scandalous; and were ordered to be struck out of the affidavits.

*In re Fitch*, 283.

4. Where a solicitor adopts a course which is obviously unreasonable and perverse, the Court will order him to pay the costs occasioned by such conduct. Where, therefore, a solicitor refused to leave with the Master a mortgage under which he claimed on behalf of a creditor, and the Master disallowed the claim as not being proved, the Court, on appeal, refused to interfere with the Master's finding, and made an order for costs against both the solicitor and client.

Under the circumstances above stated, the Court gave the client (the creditor) a further opportunity of proving his claim, unless the solicitor should shew that he acted under express instructions.

*Brigham v. Smith*, 462.

### SOLICITOR'S LIEN.

A solicitor's lien on title deeds for his professional services attaches and continues, although the property to which they relate, has passed from the ownership of the client, for whom they were performed, by sale and purchase under a power of sale contained in a mortgage. The purchaser takes the interest of the mortgagor, subject to such lien.

*Gill v. Gamble*, 135.

### SPECIALTY OR SIMPLE CONTRACT BILL.

A surety for an administrator deceased, who was indebted to the estate, on judgment being recovered against him, paid the amount and took an assignment of the administration bond to a trustee for himself. *Query*, whether the debt to the surety was a specialty or a simple contract debt.

*Re Whittemore*, 17.

### STAYING PROCEEDINGS.\*

1. Security for the costs in appeal, as well as those of the Court below will be required to be given before proceedings in Court below will be stayed, pending an appeal.

*Heward v. Heward*, 245.

2. The Church Society of the Diocese of Toronto had become united to, and incorporated with, the Synod of the Diocese by Act of Parliament. A bond for security for costs of appeal, &c., had been filed, and a motion made to allow such bond, which was objected to on the ground that such a bond could not be properly executed without the concurrence of at least one-fourth of the clergy of the Diocese, and unless at least one-fourth of the congregations were represented.

*Held*, that the Synod was bound by what had been done by the proper officers of the former corporation without waiting for the action of the Synod, and that there was an implied authority in the Act, authorizing them to take such a proceeding as that in question, on behalf of, and in the name of, the Synod, and a stay of proceedings pending the appeal was granted.

*Boulton v. Church Society*, 377.

### STOP ORDER.

The Court has no jurisdiction to grant a "stop order" at the instance of a judgment creditor of a party entitled to funds in Court.

*Lee v. Bell*, 114.

**STYLE OF CAUSE.**

1. A bond for security for costs in should be styled in the Court of Error and Appeal.

The style of the cause in the Court below, if adopted, should be the style in full, and the parties should be described as they respectively become appellants or respondents, but to carry out the view of the Court, as intimated in *Harvey v. Smith* (2 E. & A. R., 480), they may be given in the same order as in the style of the original cause.

*Weir v. Matheson*, 73.

2. After a bill has been dismissed against one defendant, the style of cause as it originally was, should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular.

*Sed, quæry*, would it be irregular if the name was omitted.

*Upper Canada Mining Company v. Attorney General*, 185.

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**STYLING AFFIDAVITS.**

Affidavits styled in short form "A. B. and others, plaintiffs," and "C. D. and others, defendants," were held to be sufficiently styled, and allowed to be read.

*Dickey v. Heron*, 490; see also *Somerville v. Kerr*, 155.

*See AFFIDAVITS.*

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**SUBMISSION.**

*See ARBITRATOR.*

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**SUBPOENA.**

A subpoena should be under the seal of the Court, not that of a Deputy Registrar.

Where a witness was served with a subpoena under the seal of a Deputy Registrar, it was held he was not bound to obey it.

*Waddell v. McGinty*, 445.

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**SUBSEQUENT INCUMBRANCERS.**

Where, by his report made under a foreclosure decree, the Master appointed a time for all the subsequent incumbrancers,

who proved before him, to redeem, the plaintiff, one of whom at the time appointed, paid the amount and took an assignment: *Held*, that the incumbrancers, who could not redeem, were entitled to three months' further time before the co-defendant could obtain a final foreclosure against them.

**Ardagh v. Wilson, 70.**

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### SUBSTITUTIONAL SERVICE.

1. Substitutional service will not be allowed under the Act 1865, unless it is shewn that it would be very expensive or very difficult to effect a service.

**Pearson v. Campbell, 25.**

2. See also

**Cupples v. Yorston, 31.**

3. Where a defendant, who was made a party in the suit in respect of a mortgage held by him upon the lands which formed the subject matter of the suit, was out of the jurisdiction, but it appeared that his solicitor had always had the mortgage in his possession, substitutional service on the solicitor was allowed.

**Young v. Wilson, 56.**

4. The administrator of a deceased mortgagee, having filed a bill against his heirs-at-law, one of whom lived abroad, in some unknown place, it was ordered that service of the bill on the sister of the absent defendant, and posting to him a copy of the order, addressed to the place where he had been last heard from, be deemed good service.

**Cameron v. Baker, 281.**

5. Where a mortgagee filed a bill for foreclosure against a mortgagor, who resided out of the jurisdiction, and whose residence was unknown, whilst the security was scanty, service was ordered on the mortgagor's wife.

**McDonald v. McMillan, 282.**

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### SUPPLEMENTAL ANSWER.

1. A supplemental answer was allowed to be filed upon terms where new matter had been discovered since former answer filed, and the delay in making the application was accounted for.

**McKinnon v. Macdonald, 23.**

2. A supplemental answer will be allowed to be filed to correct an error in the original answer, or state some facts discovered since answer filed, although some delay has taken place since the discovery of the new matter; and all the more readily if the plaintiff has himself not been urgent in pressing the cause.

*Worts v. How*, 111.

3. A motion for leave to file a supplemental answer must be made in Court.

*Attorney General v. Casey*, 279.

4. The fact that an answer had been sworn before a commissioner, who had been formerly concerned as solicitor in the cause, was not held to be ground for taking the answer off the files; but where an answer had been irregularly transmitted, it was ordered to be resworn within a given time, with costs against the defendants.

*Gordon v. Johnson*, 205.

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## SUMMARY JURISDICTION.

*See SOLICITOR.*

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## SWEARING ANSWER.

The fact that an answer had been sworn before a commissioner who had formerly been concerned as solicitor in the cause, was not held to be ground for taking the answer off the files.

*Gordon v. Johnson*, 205.

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## TAXATION.

1. Costs of taxation, where party does not appear.

*Re Kerr*. 47.

2. Adding an item.

*Re Crawford v. Crombie*, 13.

3. Where a solicitor's bill has been delivered more than a month, and no action brought, he can not obtain order to tax on *præcipe*, but must apply on petition.

*Re Boultbee*, 58; see also *Stinson v. Martin*, 86.

4. A party is not entitled to the delivery of any bill he is not entitled to have taxed; and where a bill has been taxed, it

will not again be referred, even with other or subsequent costs, except on proof of special circumstances.

An application to tax costs should be on petition and not by motion.

*Bell v. Wright*, 96.

5. In the absence of gross overcharge or pressure, the Court will not open up and tax a solicitor's bill which has been rendered several years and treated as paid, the solicitor having abandoned any excess over certain sums received by him.

*Re Thompson*, 100.

6. Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do. In such case the guardian was allowed only an attending fee without brief.

*McLaren v. Coombs*, 124.

7. Where an order for taxation had been obtained *ex parte* at the instance of one of two clients who had jointly retained the solicitors, whose bill it was sought to tax, such order was set aside as irregularly obtained.

*Re Beecher, Barker, and Street*, 215.

8. A petitioner seeking to tax a bill of costs rendered over a year, must allege and establish items of overcharge, and shew special circumstances why taxation should be permitted.

*In re Malcolm Cameron*, 311.

9. A solicitor is liable for moneys which have come to his hands, and can be called on to account under a summary order, although the transaction may be one, which were the party not a solicitor, would be an ordinary case of principal and agent.

*Re Walker*, 324.

10. A re-taxation of a solicitor's bill will not be ordered unless improper charges are specified and established.

*Eastman v. Eastman*, 325.

11. No bargain between a solicitor and client whereby the latter undertakes to pay more than the recognized fees for the work to be done, can be enforced.

Where a solicitor's Toronto agent made a bargain with the client for two dollars an hour, such bargain was held not to be binding, although looked upon to be reasonable, the sufficiency or insufficiency of the amount not being held to affect the question where the item is fixed by tariff.

*Re Geddes and Wilson*, 447.

12. An order to tax a solicitor's bill is not to be granted *ex parte* on the application of the solicitor where there appear to be any facts in dispute between him and the client. It is the duty of the solicitor applying to make known such facts to the Court, and if he does not, the order will be set aside.

Motions for taxation under such circumstances should be on notice, and the reference should as a rule be to the Master at Toronto, although in special cases such rule may be departed from.

*Re Fitch*, 288.

### TAX SALE.

The Act 32 Vic. ch. 35, respecting lands sold for arrears of taxes, applies only to cases in which the validity of a tax sale is called in question.

If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to the other branch of his case.

*Cameron v. Barnhart*, 346.

### TITLE.

Making a title where heirs are minors.

*Donaldson v. Berry*, 16.

### TITLE DEEDS.

The mortgagor, after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee, on a motion for that purpose, an order was made for their delivery.

*Stennett v. Aruyn*, 218.

### TRANSMITTING ANSWER.

Where an answer had been irregularly transmitted, it was ordered to be resworn within a given time, with costs against the defendant.

*Gordon v. Johnson*, 205.

### TRUSTEE AND *CESTUI QUE* TRUST.

Where a judgment debtor had suffered a judgment to be taken, and execution to be issued against his goods, in a suit

which he had himself caused to be brought by a party as trustee for his wife, under the assumption that she was beneficially entitled to claim certain money come to his hands from the estate of her father, which in fact, however she was not, but a third person, her mother was equitably entitled ; on an application at the instance of a judgment creditor that a co-defendant with the judgment debtor should be directed to file a bill to impeach the judgment so obtained by the wife's trustee, the Court refused to interfere, holding that there was sufficient doubt of the impeachability of the judgment to induce the Court to restrain from directing a bill to be filed, but left the party entitled to the equity to take proceedings on her own responsibility. The application was, under the circumstances, refused with costs.

When a security intended to be given for the benefit of one supposed to be equitably entitled, although in preference to another creditor, and which would itself be unimpeachable has been given by mistake to a wrong person, and that person the wife of the grantor, the transaction, although the grantee had been apparently influenced by motives of personal advantage, was held not necessarily to be impeachable.

*Grainger v. Latham*, 419.

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### TRUSTS ACTS.

Under the Statute 29 Vic., sec. 58, to amend the law of property and trusts, the Court made an order approving of a proposed sale to a partner of an intestate, of an intestate's interest in the partnership assets.

*Ex parte Sessions.*

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### VENDOR AND PURCHASER.

1. Who should prepare conveyance.

*Watt v. Parker*, 33.

2. Where there had been considerable delay in completing the title to property, and the purchaser paid the purchase money into Court without prejudice, it was held improper in charging the vendors with the rents during the interval, to direct the Master in fixing the amounts to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration and damage to the property, except such as occurred through the act or default of the vendors.

*Dudley v. Berczy*, 364.

**WAIVER.**

*See SECURITY FOR COSTS, 11.*

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**WAIVING IRREGULARITY.**

*See SERVICE, 6.*

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**WILL.**

*See DEVISE.*

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**WITNESS.**

1. A witness or a party is not obliged to attend and give evidence or submit to cross-examination, except he be duly notified, or subpoenaed even if he happens to be present when the proceedings are going on.

Where, therefore, a party to a suit who had made an affidavit was present in the Master's office, and the solicitor for the opposite party proposed to cross-examine him on his affidavit, and he refused to answer, a motion *ex parte* to compel him to attend and be examined, was refused.

*Robins v. Carson, 343.*

2. On an application made by the plaintiffs in an administration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution, which had been recovered by a third party against a debtor to the estate, on the grounds of the same being fraudulent and collusive, the debtor was subpoenaed as a witness in support of the motion, and on his examination touching the *bona fides* of a judgment in question, he thus stated his objection: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit, in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me."

*Held*, that this objection was not tenable, and the witness was ordered to attend again, at his own expense, and answer, and pay all costs occasioned to the plaintiff and the personal representative, by his refusal.

*Held* also, that, to entitle the witness to privilege, on the ground that his answer would expose him to a "penalty or

forfeiture;" he must state explicitly that he believes his answer would have that effect, and not merely leave it to be inferred that his answer would have that effect.

Grainger v. Latham, 313.

WITNESS FEES.

A public officer who has charge of documents for which he is responsible, and attends as a witness in his public capacity, and in relation to matters connected with his office, will be allowed professional witness fees of \$4 per day.

*Re Nelson, 252.*

WRIT OF ARREST.

*See ARREST.—EXECUTORS.*

WRIT OF SEQUESTRATION.

*See SEQUESTRATION.*

E R R A T A .

Page 76.—Omit paragraph commencing *held*, it being a repetition of the head note.

Page 89.—The note at the end of case should be a head note.

Page 125.—8 lines from bottom, for "prove" read "procure."

Page 190.—2nd line from top, for "23 Beav. 456," read "23 Beav. 268;" and for "21 Beav. 456," read "21 Beav. 426." Same line, for "Fair" read "Ford."

Page 202.—7th line of statement, for "no addition" read "in addition."

Page 207.—In head note, for "notice" read "motion."

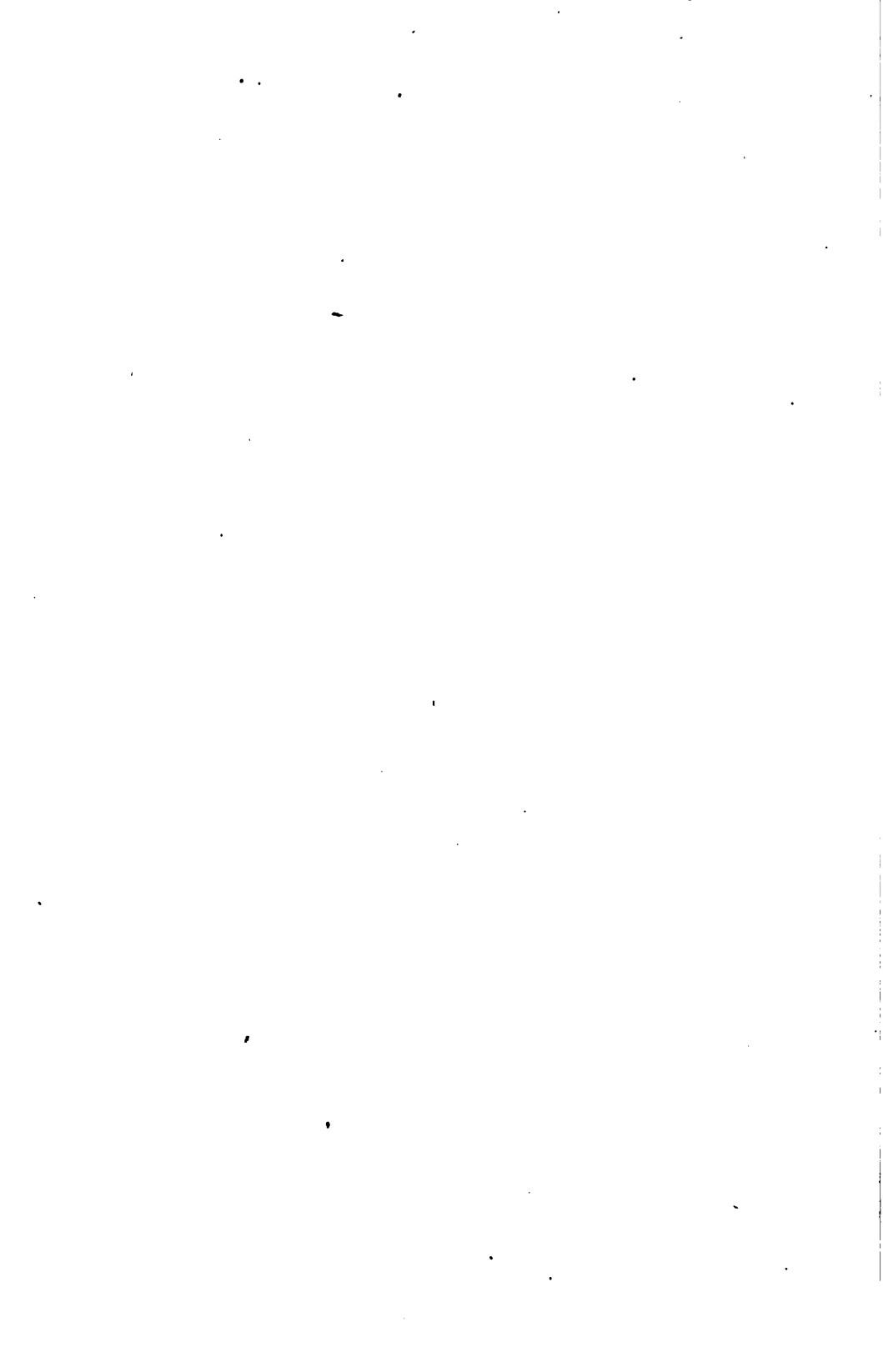
Page 296.—8th line from bottom, omit "not."

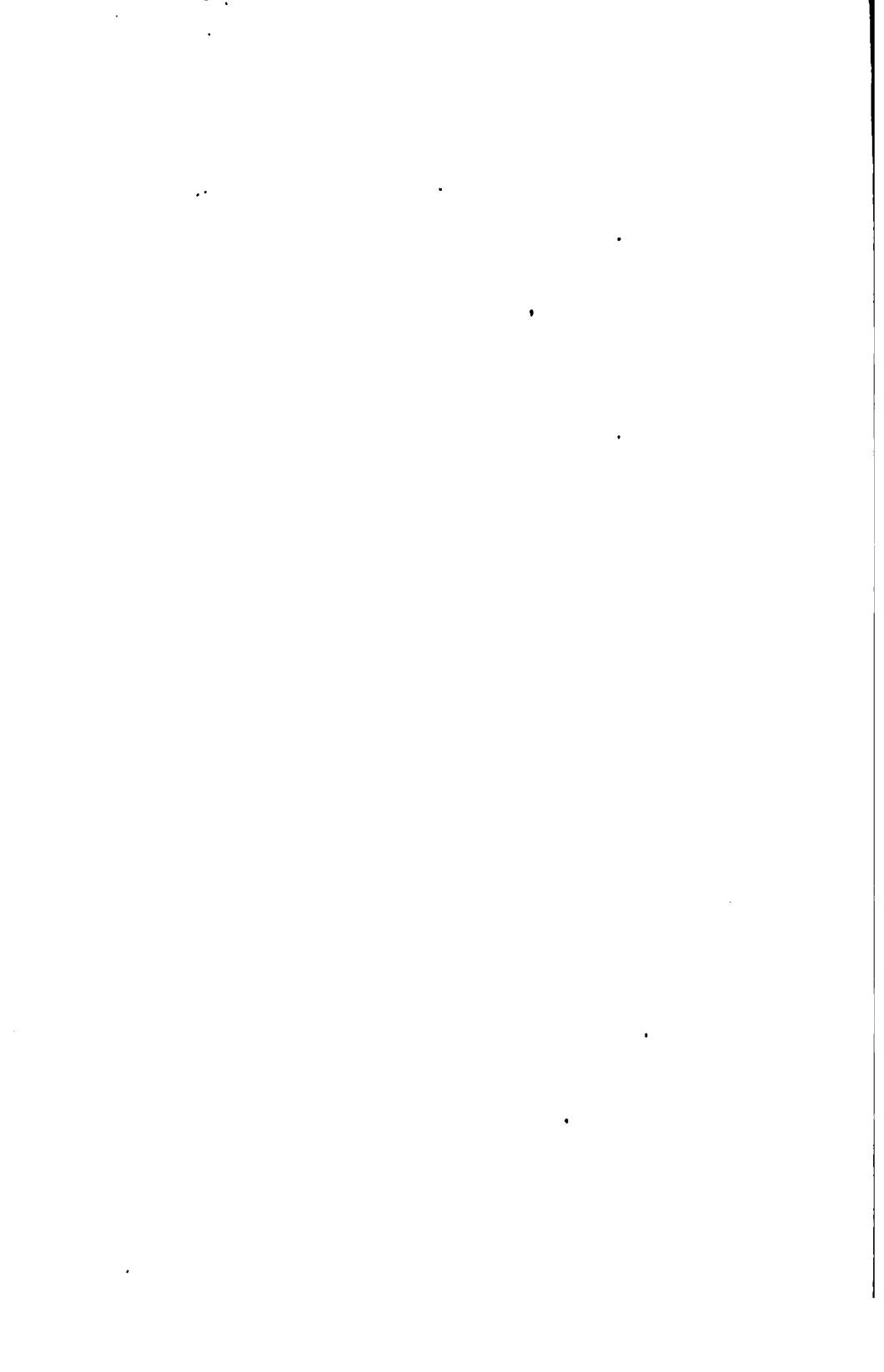
Page 298.—6 lines from bottom, for "strike" read "shook."

Page 327.—For "14 Eard," read "14 Grant."

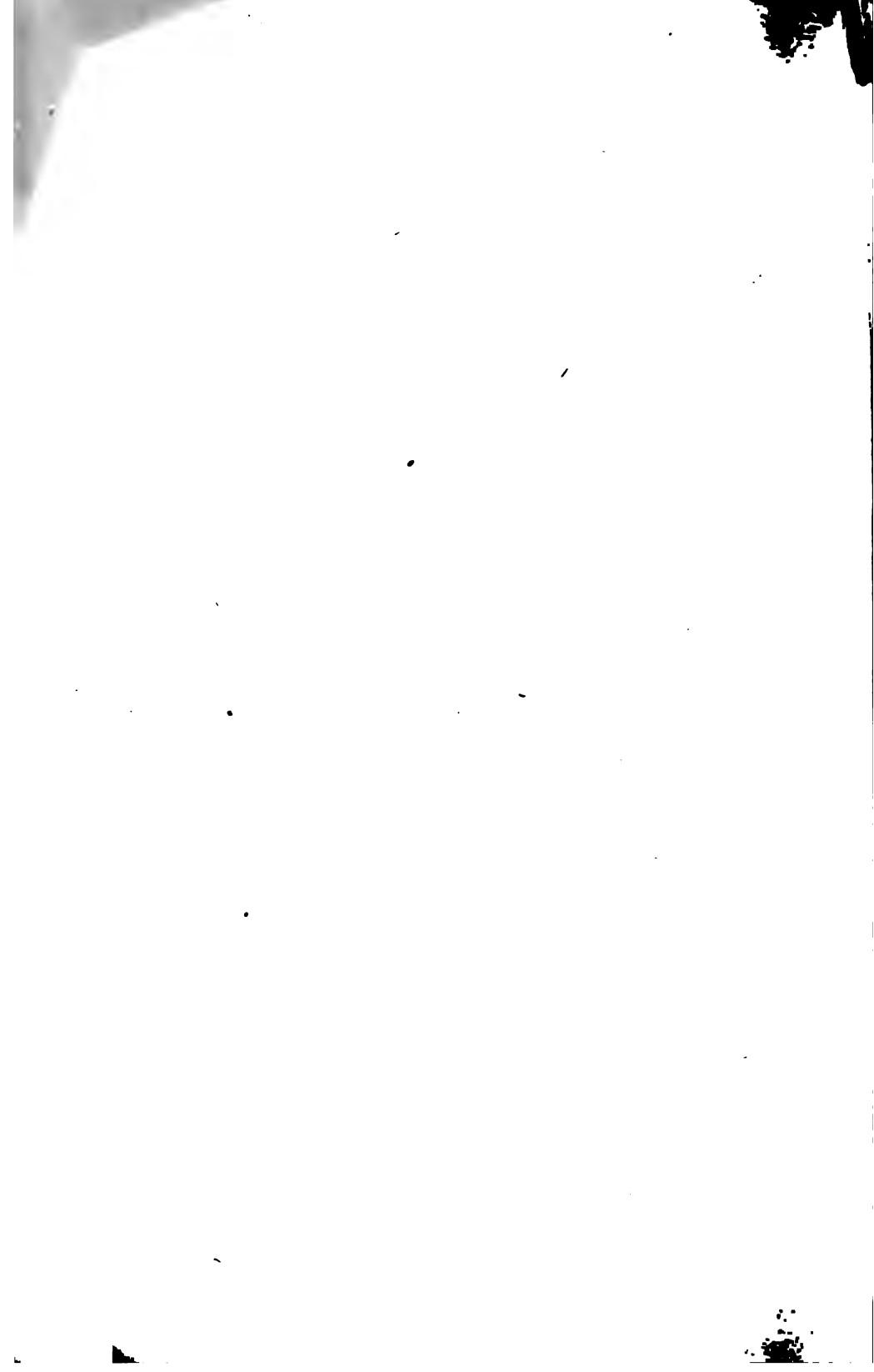
Page 365.—4th line from bottom, for "Robinson v. Page" read "Jones v. Mudd."

Page 481.—8 lines from bottom, after "guarded" supply "against."









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